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Mohd Khir bin Toyo v Public Prosecutor

B FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 05–122 OF 2013
ZULKEFLI CJ (MALAYA), AHMAD MAAROP, HASAN LAH, JEFFREY TAN AND RAMLY ALI FCJJ
29 SEPTEMBER 2015

C

Criminal Law — Penal Code — Section 165 — Whether ingredients of offence against ex-Chief Minister proved beyond reasonable doubt — Whether charge not defective for failure to cite appellant as chairman of state economic development corporation (SEDC) as Chief Minister held that post ex-officio — Whether Chief D *Minister was public servant even when he acted as chairman of SEDC — Whether person from whom appellant bought land at undervalue not accomplice in commission of corrupt act whose evidence required corroboration — Anti-Corruption Act 1997, s 44(1)(a)(ii) and 44(2) — Whether imprisonment right and proper punishment for appellant's offence — Whether fine* E *or offer by appellant to do community service in lieu of jail term unacceptable — Whether trial court's order that subject-matter of offence (land) be forfeited mandated by s 36(1) read with ss 56 and 2 of the Anti-Corruption Act 1997 — Whether order for forfeiture breached art 13(1) of the Federal Constitution*

F The High Court had sentenced the appellant, a former Menteri Besar of Selangor, to a year's jail on finding him guilty of an offence under s 165 of the Penal Code ('the Code'). The charge stated that while he was Menteri Besar, and hence a public servant, the appellant had accepted for himself and his wife valuable property for a consideration which he knew to be inadequate from a G person ('SP2') who, he knew, had connection with his official functions. The property in question ('the land') comprised two adjoining lots of land (on one of which was a bungalow) covering a total area of more than 50,000 sqft. The appellant had bought the land from Ditamas Sdn Bhd ('Ditamas') through its director, SP2, for RM3.5m notwithstanding Ditamas had bought it for H RM6.5m three years earlier. Consequent upon the appellant's conviction, the High Court ordered the land to be forfeited pursuant to s 36(1) of the Anti-Corruption Act 1997 ('ACA'). At the trial, the former owner of the land, SP1, testified that shortly after the appellant and his wife visited the land in 2004 with a view to buying it but found the price of RM7m quoted by SP1 to I be 'too expensive', SP2 bought the land for RM6.5m. SP2, whose companies were awarded projects by the Selangor state government, testified that he met the appellant often in the course of his work and he came to know that the appellant wanted to buy the land. When the appellant suggested to SP2 that he buy the land, SP2 got the impression the appellant would eventually buy it

from him and he went ahead to buy the property because he did not want his business interests in Selangor to be jeopardised if he did not do as suggested by the appellant. SP2 testified that as soon as he had paid the purchase price for the land in full, the appellant appointed a contractor, SP3, to renovate the land and the buildings on it 'Bali-style'. The renovations began when the land was still under Ditamas's name and it involved the destruction and reconstruction of the bungalow. SP3 testified that he received as much as RM6m to carry out the renovation works and the monies came from both SP2 (who had hoped for reimbursement from the appellant) and the appellant himself. SP2 said that in 2007, mid-way through the renovations and when the original bungalow had been substantially destroyed, the appellant told him to sell the land to him and his wife for RM3.5m arguing that the RM5m–RM5.5m that SP2 wanted was too much in view of the condition of the property. SP2 said the appellant then suggested they allow a valuer to determine the value of the land and a valuer appointed by the appellant's bank certified the value to be RM3.5m. SP2 said he reluctantly agreed to sell the land to the appellant for RM3.5m, again, so that his business interests in Selangor would not be adversely affected. The High Court held the charge against the appellant was proved beyond reasonable doubt. Inter alia, it held there was no evidence to show why SP2 would sell the land to the appellant for RM3.5m when his company had bought it for RM6.5m; that it was the appellant who appointed SP3 and ordered demolition and reconstruction even before he bought the land from SP2; that SP2 and SP3 were credible and reliable witnesses and that, on the facts of the case, the valuation reports tendered at trial to show the market value of the land were irrelevant as the appellant knew, when he viewed the land in 2004, that SP1 had wanted RM7m for it. The Court of Appeal dismissed the appellant's appeal against conviction and sentence resulting in the instant appeal where, in addition to the conviction and sentence, the order for forfeiture of the land was also challenged. The grounds for the instant appeal were, inter alia, that: (a) the appellant was prejudiced by the charge only referring to him as Menteri Besar and not as chairman of the Selangor State Economic Development Corporation ('PKNS') which, according to the evidence, was the capacity in which the appellant had dealt with SP2 and his companies (b) the appellant was not a public servant either as chairman of PKNS or as Menteri Besar within the meaning of ss 21(i) and 165 of the Code (c) SP2 was an accomplice and interested witness and his evidence should have been treated with suspicion and required corroboration (d) the prosecution failed to prove the appellant knew SP2 had dealings with him in his official capacity (e) the courts below were wrong to dismiss the various valuation reports tendered in the case as irrelevant because the adequacy, or otherwise, of the consideration the appellant had paid for the land could only be determined by the market value of the land (f) both SP2 and SP3 were not credible witnesses (g) the evidence for the defence was not sufficiently considered, and (h) there was no provision for forfeiture of the land under s 165 and the

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invocation of the ACA to order the forfeiture violated arts 8 and 13 of the Federal Constitution.

Held, dismissing the appeal and affirming the conviction, sentence and the order for forfeiture of the land:

(1) (per **Jeffrey Tan FCJ**) A review of the entire case failed to reveal any doubt to warrant reversal. Notwithstanding the defence and arguments of counsel, it remained that the offence as charged was proved beyond all reasonable doubt at the end of the entire case (see para 154).

(2) (per **Jeffrey Tan FCJ**) There was no defect in the charge. There was no error or omission either in the ingredients of the offence or in the particulars of it. It was not shown that the appellant was materially misled or that a miscarriage of justice had occurred. All the required ingredients of the offence were clearly stated in the charge. It was not an error in the particulars of the offence to state that the appellant knew that SP2 had connections with his official work as Chief Minister. The official work of the appellant as chairman of PKNS was an integral part of his official work as Chief Minister. Section 4(1) of the PKNS Enactment stated that the Chief Minister shall be the chairman of PKNS. As such, it could not be argued that the official work of the chairman of PKNS was not the official work of the appellant as Chief Minister (see paras 62–63 & 65).

(3) (per **Jeffrey Tan FCJ**) The appellant knew SP2 had connection with his official work. Whether the appellant had or had not approved the applications of SP2's companies either as Chief Minister or as PKNS chairman was not the issue and had no relevance to the issue of the appellant's knowledge of the alleged connection. The letters/applications of SP2's companies which bore the signatures of SP2 and the endorsement of the appellant clearly showed the appellant should have known that SP2 had connections with his official work (see paras 64 & 113).

(4) (per **Jeffrey Tan FCJ**) The submission that SP2 was an accomplice and that his evidence had to be corroborated failed. Section 2 of the Anti-Corruption Act 1997 ('the ACA') stated that an offence punishable under s 165 of the Code was a prescribed offence. Section 56 of the ACA provided that all provisions of the ACA applied to a prescribed offence. Pursuant to s 44(1)(a)(ii) of the ACA, no giver could be 'regarded as an accomplice' and under s 44(2), a conviction on the uncorroborated evidence of any accomplice 'shall not be set aside merely because the court which tried the case failed to refer in the grounds of its judgment to the need to warn itself against the danger of convicting on such evidence' (see paras 36–37 & 66–67).

(5) (per **Jeffrey Tan FCJ**) Whether as Chief Minister or 'officer' or as one in

the pay or service of Government, the appellant was a 'public servant' within the meaning of the Code. Under s 21(i) of the Code, the words 'public servant' included 'every officer in the service or pay of Government, or remunerated by fees or commission for the performance of any public duty'. As Chief Minister and member of the State Legislature, the appellant was clearly in the pay of Government. As head of the State Executive Council, he was in the service of Government. And as Chief Minister, he was paid by Government and entrusted with the performance of a public duty, which meant he was an 'officer' under s 21(i) of the Penal Code. The appellant remained a 'public servant' even while he wore the hat of chairman of PKNS (see paras 76–78 & 85).

(6) (per **Jeffrey Tan FCJ**) The appellant should have known the consideration he paid to buy the land from SP2 was inadequate. That the consideration was inadequate was also supported by other direct evidence from various valuers. When he visited the land in 2004, the appellant knew the sale price was RM7m. Three years later, when SP2 quoted RM5m–RM5.5m for the land, it was plainly a bargain for the taking. Yet, the appellant insisted on a sale based on valuation. In a usual sale on a willing seller-willing buyer basis, that would not happen. If the price could not be agreed upon, the sale would be called off. In a normal case, no buyer would have the audacity to insist on consideration based on valuation. But the appellant had his way and the sale to him was based on valuation that matched the exact sum he had offered SP2 which the latter did not accept initially. The land was sold to the appellant for RM3.5m in 2007 when he knew SP1 had asked for RM7m for it in 2004. SP2 was not a willing seller and it supported SP2's story that he had no option but to sell out of fear his business with PKNS, where the appellant was chairman, would otherwise be adversely affected (see paras 90–91, 93 & 136).

(7) (per **Jeffrey Tan FCJ**) It was the firm testimony of SP2 and SP3 that it was the appellant who appointed SP3 as the renovation contractor and instructed demolition and reconstruction before 2007, that is, from the start. There was no material to discredit or disbelieve either SP2 or SP3. Their testimonies were intact and were substantially undisputed (see paras 119–120 & 123–125).

(8) (per **Jeffrey Tan FCJ**) The valuations done by SP8, SP10 and SD5 on the land with 60% building in 2007 were, respectively, RM5.5m, RM5.52m and RM3.5m. On the evidence, the valuation of SD5 could not be preferred but even if it was preferred, it could not cast any doubt that the consideration was inadequate. It was established evidence that SP1 spent about RM3.8–RM4.2m to buy the land and erect a house in 1998/1999 and the transaction in 2004 was on a willing seller-willing buyer basis. For that transaction in 2004, the valuation department valued the land

and house at RM5m. By all accounts, the value of land and house in 2007 was at least RM5m. Reasonably, the value could not have fallen to RM3.5m in 2007. If it did, it was only because of the renovation and reconstruction done by the appellant. Had the house been untouched, it should at least have held its value. But the appellant took over the house and broke it. All loss was brought about by the appellant. He could not get away by saying there was an incomplete house on the land. The appellant had accepted land and house of value of at least RM5m. He had to pay the full value for them, which was at least RM5m. RM3.5m was clearly inadequate consideration (see paras 148 & 153).

(9) (per **Zulkefli CJ (Malaya)**) The appellant as a public servant and chief executive of the State took advantage of his official position. One purpose of s 165 of the Code was to prevent that sort of corruption. Corruption in all manner and form could not be condoned. A fine could not send that message. Neither could community service. Community service was an option only in the case of youthful offenders (s 293 of the CPC). The provisions of the Offenders Compulsory Attendance Act 1954 with regard to community service did not apply to the appellant (see s 5(1) of that Act). The instant offence, which was destructive of public confidence in the government, was not trivial in nature. Imprisonment was the right and proper punishment. A year's jail, which was not appealed against by the prosecution, was hardly excessive (see para 157).

(10) (per **Zulkefli CJ (Malaya)**) The forfeiture of the land was ordered in accordance with the law which mandated forfeiture upon the appellant's conviction (see s 36(1) read with ss 56 and 2 of the Anti-Corruption Act 1997). The land was not arbitrarily forfeited. It was a lawful deprivation. There was no breach of art 13(1) of the Federal Constitution. The subject matter of the offence was the land and not, as argued by the appellant, the differential sum between the fair value of the land and the consideration he had paid for it. The order for forfeiture was upheld subject to any charge upon on the land by the bank (see paras 159–160).

[Bahasa Malaysia summary

Mahkamah Tinggi telah menjatuhkan hukuman ke atas perayu, Menteri Besar Selangor, penjara satu tahun apabila dia didapati bersalah kerana satu kesalahan di bawah s 165 Kanun Keseksaan ('Kanun'). Pertuduhan itu menyatakan bahawa pada masa dia seorang Menteri Besar, dan justeru seorang penjawat awam, perayu telah menerima daripada dirinya dan isterinya harta bernilai bagi balasan yang mana dia mengetahui adalah tidak mencukupi daripada seseorang ('SP2') yang, diketahuinya, mempunyai kaitan dengan fungsi-fungsi rasminya. Harta yang dipersoalkan ('tanah itu') yang terdiri daripada dua tanah lot yang bersebelahan (di mana salah satunya terdapat banglo) meliputi kawasan keseluruhan melebihi 50,000 kaki persegi. Perayu telah membeli tanah itu daripada Ditamas Sdn Bhd ('Ditamas') melalui

pengarahnya, SP2, untuk RM3.5 juta walaupun Ditamas telah membelinya pada RM6.5 juta tiga tahun sebelum itu. Berikutan sabitan perayu, Mahkamah Tinggi memerintahkan tanah itu dirampas menurut s 36(1) Akta Pencegahan Rasuah 1997 ('APR'). Semasa perbicaraan, pemilik lama tanah itu, SP1, memberi keterangan bahawa sejurus selepas perayu dan isterinya melawat tanah itu pada 2004 dengan tujuan untuk membelinya tetapi mendapati harga RM7 juta disebut harga oleh SP1 sebagai 'too expensive', SP2 telah membeli tanah itu untuk RM6.5 juta. SP2, yang mana syarikat-syarikat itu telah diawardkan projek-projek oleh kerajaan negeri Selangor, telah memberi keterangan bahawa dia sering berjumpa dengan perayu sepanjang pekerjaannya dan dia mendapat tahu bahawa perayu ingin membeli tanah itu. Apabila perayu mencadangkan kepada SP2 agar dia membeli tanah itu, SP2 mendapat gambaran yang perayu akan akhirnya membelinya daripadanya dan dia meneruskan belian hartanah itu kerana dia tidak ingin kepentingan perniagaannya di Selangor terjejas jika dia tidak berbuat demikian seperti yang dicadangkan oleh perayu. SP2 telah memberi keterangan yang sebaik sahaja dia membayar harga belian untuk tanah itu sepenuhnya, perayu telah melantik seorang kontraktor, SP3, untuk mengubahsuai tanah itu dan bangunan di atasnya dalam gaya Bali. Pengubahsuaian itu bermula apabila tanah itu masih di bawah nama Ditamas dan ia melibatkan kemusnahan dan pembinaan semula banglo itu. SP3 memberi keterangan bahawa dia telah menerima sebanyak RM6 juta untuk menjalankan kerja-kerja pengubahsuaian dan wang itu datang daripada kedua SP2 (yang mengharapkan bayaran balik daripada perayu) dan perayu itu sendiri. SP2 menyatakan bahawa pada 2007, di pertengahan jalan pengubahsuaian itu dan apabila banglo asal telah dimusnahkan sebahagian besarnya, perayu memberitahunya supaya menjual tanah itu kepadanya dan isterinya untuk RM3.5 juta dengan alasan bahawa RM5 juta–RM5.5 juta yang SP2 mahu adalah terlalu banyak memandangkan keadaan harta itu. SP2 berkata perayu kemudiannya mencadangkan mereka membenarkan penilai untuk menentukan nilai tanah dan penilai yang dilantik oleh bank perayu mengesahkan nilainya adalah RM3.5 juta. SP2 berkata dia dengan berat hati bersetuju untuk menjual tanah itu kepada perayu untuk RM3.5 juta, sekali lagi, supaya kepentingan perniagaannya di Selangor tidak akan terjejas. Mahkamah Tinggi memutuskan pertuduhan terhadap perayu telah dibuktikan melampaui keraguan munasabah. Antara lain, ia memutuskan tidak ada bukti yang menunjukkan mengapa SP2 menjual tanah itu kepada perayu untuk RM3.5 juta apabila syarikatnya telah membelinya untuk RM6.5m; bahawa perayu yang telah melantik SP3 dan mengarahkan perobohan dan pembinaan semula sebelum dia membeli tanah itu daripada SP2; bahawa SP2 dan SP3 adalah saksi-saksi berwibawa dan boleh dipercayai dan bahawa, atas fakta kes, laporan penilaian yang dikemukakan semasa perbicaraan untuk menunjukkan nilai pasaran tanah itu tidak relevan kerana perayu mengetahui, apabila dia melihat tanah itu pada tahun 2004, bahawa SP1 mahukan tanah itu untuk RM7 juta. Mahkamah Rayuan menolak rayuan perayu terhadap sabitan dan hukuman menyebabkan rayuan ini di mana,

sebagai tambahan kepada sabitan dan hukuman itu, perintah perampasan tanah itu juga dicabar. Alasan bagi rayuan ini adalah, antara lain, bahawa: (a) perayu telah diprejudiskan oleh pertuduhan itu yang hanya merujuk kepadanya sebagai Menteri Besar dan bukan sebagai pengerusi Perbadanan Kemajuan Ekonomi Negeri Selangor ('PKNS') yang menurut bukti, adalah kapasiti di mana perayu itu telah berurusan dengan SP2 dan syarikat-syarikatnya; (b) perayu bukan penjawat awam sama ada sebagai pengerusi PKNS atau sebagai Menteri Besar mengikut maksud ss 21(i) dan 165 Kanun; (c) SP2 adalah rakan sejenayah dan saksi berkepentingan dan keterangannya sepatutnya diambil dengan syak wasangka dan memerlukan keterangan sokongan; (d) pihak pendakwaan gagal membuktikan perayu itu mengetahui SP2 berurusan dengannya dalam kapasiti rasminya; (e) mahkamah bawahan adalah salah untuk menolak pelbagai laporan penilaian yang telah dikemukakan dalam kes itu sebagai tidak relevan kerana kecukupan, atau sebaliknya, balasan yang telah dibayar oleh perayu bagi tanah itu hanya boleh ditentukan oleh nilai pasaran tanah; (f) kedua-dua SP2 dan SP3 bukan saksi yang boleh dipercayai; (g) keterangan pembelaan tidak cukup dipertimbangkan; dan (h) tidak ada peruntukan bagi pelucuthakan tanah di bawah s 165 dan seruan BPR untuk memerintahkan pelucuthakan itu melanggar perkara 8 dan 13 Perlembagaan Persekutuan.

Diputuskan, menolak rayuan dan mengesahkan sabitan, hukuman dan perintah bagi pelucuthakan tanah itu:

(1) (oleh **Jeffrey Tan HMP**) Satu semakan semula keseluruhan kes telah gagal untuk menunjukkan apa-apa keraguan untuk mewajarkan semakan semula. Walau apa pun pembelaan dan hujah peguam, ia mengekalkan bahawa kesalahan seperti dituduh telah dibuktikan melampaui segala keraguan munasabah di akhir keseluruhan kes (lihat perenggan 154).

(2) (oleh **Jeffrey Tan HMP**) Tiada kecacatan dalam pertuduhan. Tiada kesilapan atau peninggalan sama ada dalam elemen-elemen kesalahan atau dalam butiran-butiran dalam kesalahan itu. Ia tidak menunjukkan bahawa perayu telah dikelirukan secara material atau bahawa keadilan tidak dilaksanakan telah berlaku. Semua elemen yang dikehendaki untuk kesalahan itu jelas dinyatakan dalam pertuduhan. Ia bukan kesilapan dalam butiran kesalahan untuk menyatakan bahawa perayu mengetahui bahawa SP2 mempunyai kaitan dengan tugas rasmi sebagai Menteri Besar. Tugas rasmi perayu sebagai pengerusi PKNS merupakan bahagian penting tugas rasminya sebagai Menteri Besar. Seksyen 4(1) Enakmen PKNS menyatakan bahawa Menteri Besar hendaklah merupakan pengerusi PKNS. Seksyen 4(1) Enakmen PKNS menyatakan bahawa Menteri Besar hendaklah merupakan pengerusi PKNS. Oleh itu, ia tidak boleh dihujahkan bahawa tugas rasmi pengerusi PKNS bukan tugas rasmi perayu sebagai Menteir Besar (lihat perenggan 62–63 & 65).

(3) (oleh **Jeffrey Tan HMP**) Perayu mengetahui SP2 mempunyai kaitan dengan tugas rasminya. Sama ada perayu telah atau tidak meluluskan permohonan syarikat-syarikat SP2 sama ada sebagai Menteri Besar atau sebagai pengerusi PKNS bukan isunya dan tidak mempunyai kaitan dengan isu pengetahuan perayu tentang berhubung dakwaan kaitan itu. Surat/permohonan syarikat SP2 yang mempunyai tandatangan SP2 dan pengindorsan perayu jelas menunjukkan perayu patut mengetahui bahawa SP2 mempunyai kaitan dengan tugas rasminya (lihat perenggan 64 & 113).

(4) (oleh **Jeffrey Tan HMP**) Hujah bahawa SP2 adalah rakan sejenayah dan bahawa keterangannya perlu disokong itu telah gagal. Seksyen 2 Akta Pencegahan Rasuh 1997 ('APR') menyatakan bahawa kesalahan yang boleh dihukum di bawah s 165 Kanun terpakai kepada kesalahan yang dinyatakan. Seksyen 56 APR memperuntukkan bahawa semua peruntukan APR boleh 'regarded as an accomplice' dan di bawah s 44(2), satu sabitan ke atas keterangan yang tidak disokong oleh mana-mana rakan sejenayah 'shall not be set aside merely because the court which tried the case failed to refer in the grounds of its judgment to the need to warn itself against the danger of convicting on such evidence' (lihat perenggan 36–37 & 66–67).

(5) (oleh **Jeffrey Tan HMP**) Sama ada sebagai Menteri Besar atau 'officer' atau sebagai salah seorang dalam penggajian atau berkhidmat untuk Kerajaan, perayu adalah 'public servant' dalam maksud Kanun. Di bawah s 21(i) Kanun, perkataan 'public servant' termasuklah 'every officer in the service or pay of Government, or remunerated by fees or commission for the performance of any public duty'. Sebagai Menteri Besar dan ahli badan perundangan kerajaan, perayu jelas dalam penggajian Kerajaan. Dan sebagai Menteri Besar, dia dibayar oleh Kerajaan dan diamanahkan dengan pelaksanaan kewajipan awam, yang bermaksud dia adalah 'officer' di bawah s 21(i) Kanun Keseksaan. Perayu masih seorang 'public servant' semasa memegang jawatan pengerusi PKNS (lihat perenggan 76–78 & 85).

(6) (oleh **Jeffrey Tan HMP**) Perayu patut mengetahui tentang balasan yang dibayarnya untuk membeli tanah itu daripada SP2 adalah tidak mencukupi. Hal balasan itu tidak mencukupi juga disokong oleh keterangan langsung lain daripada pelbagai penilai-penilai. Apabila dia melihat tanah itu pada 2004, perayu mengetahui tentang harga jualan adalah RM7 juta. Tiga tahun kemudian, apabila SP2 menyebut harga RM5 juta-RM5.5 juta untuk tanah itu, ia jelas suatu tawaran untuk diambil. Malah, perayu mendesak jualan berdasarkan penilaian. Dalam jualan biasa atas dasar penjual dan pembeli yang berkeinginan, ia tidak akan berlaku. Jika harga tidak boleh dipersetujui, jualan boleh ditarik balik. Namun perayu mendapat caranya dan jualan kepadanya adalah

berdasarkan penilaian yang sepadan dengan jumlah sama yang ditawarkan kepada SP2 yang mana pada mulanya tidak diterima oleh SP2. Tanah itu telah dijual kepada perayu untuk RM3.5 juta dalam 2007 apabila dia mengetaui SP1 memintanya untuk RM7 juta dalam 2004. SP2 bukan penjual yang berkeinginan dan ia menyokong cerita SP2 bahawa dia tiada pilihan tetapi untuk menjual kerana bimbang perniagaannya dengan PKNS, di mana perayu merupakan pengerusi, akan sebaliknya terjejas (lihat perenggan 90–91, 93 & 136).

(7) (oleh **Jeffrey Tan HMP**) Ia adalah keterangan tegas SP2 dan SP3 bahawa perayulah yang melantik SP3 sebagai kontraktor pengubahsuaian dan mengarahkan keruntuhan dan pembangunan semula sebelum 2007, yang mana, dari mula lagi. Tiada perkara untuk tidak mempercayai SP2 atau SP3. Keterangan mereka kukuh dan tidak dipertikaikan secara substansial (lihat perenggan 119–120 & 123–125).

(8) (oleh **Jeffrey Tan HMP**) Penilaian-penilaian yang dibuat oleh SP8, SP10 dan SD5 ke atas tanah itu dengan 60% bangunan ialah masing-masingnya, RM5 juta, RM5.52 juta dan RM3.5 juta. Berdasarkan keterangan, penilaian SD5 tidak boleh dibuat tetapi jikapun ia dibuat, ia tidak boleh menimbulkan apa-apa keraguan bahawa balasan itu tidak mencukupi. Ia telah dibuktikan bahawa SP1 berbelanja lebih kurang RM3.8 juta–RM4.2 juta untuk membeli tanah itu dan membina rumah pada 1998/1999 dan transaksi dalam 2004 adalah atas dasar penjual berkeinginan-pembeli berkeinginan. Bagi transaksi tersebut dalam 2004, jabatan penilaian telah menilai tanah dan rumah itu pada RM5 juta. Berdasarkan semua akaun, nilai tanah dan rumah itu pada 2007 adalah lebih kurang RM5 juta. Secara munasabah, nilai itu tidak boleh jatuh kepada RM3.5 juta dalam 2007. Jikapun berlaku, ia hanya kerana pengubahsuaian dan pembinaan semula itu dilakukan oleh perayu. Jika rumah itu tidak diusik, ia patut sekurang-kurangnya mengekalkan nilainya. Namun perayu telah mengambil alih rumah itu dan meruntuhkannya. Segala kerugian itu disebabkan oleh perayu. Dia tidak boleh mengelak dengan menyatakan terdapat rumah tidak siap atas tanah itu. Perayu telah menerima tanah dan rumah itu pada nilai sekurang-kurangnya RM5 juta. Dia terpaksa membayar nilai penuh untuk kedua-duanya, iaitu sekurang-kurangnya RM5 juta. RM3.5 juta jelas bukan balasan yang mencukupi (lihat perenggan 148 & 153).

(9) (oleh **Zulkefli Hakim Besar (Malaya)**) Perayu sebagai penjawat awam dan ketua pegawai eksekutif kerajaan mengambil kesempatan atas kedudukan rasminya. Satu tujuan s 165 Kanun adalah untuk menghalang jenis rasuah sebegini. Rasuah dalam semua cara dan bentuk tidak boleh diterima. Denda tidak dapat menyampaikan tujuan itu. Begitu juga khidmat masyarakat. Khidmat masyarakat adalah pilihan hanya dalam kes pesalah muda (s 293 Kanun Tatacara Jenayah).

Peruntukan-peruntukan Akta Kehadiran Wajib Pesalah-Pesalah 1954 berkenaan khidmat masyarakat tidak terpakai kepada perayu (lihat s 5(1) Akta tersebut). Kesalahan ini, yang merupakan keruntuhan keyakinan orang awam dalam kerajaan, tidak remeh sifatnya. Pemenjaraan adalah hukuman yang betul dan wajar. Setahun penjara, yang tidak dirayu oleh pendakwaan, tidak langsung melampau (lihat perenggan 157).

(10)(oleh **Zulkefli Hakim Besar (Malaya)**) Pelucutan hak tanah itu diperintahkan menurut undang-undang yang memandatkan pelucutan hak atas sabitan perayu (lihat s 36(1) dibaca dengan ss 56 dan 2 Akta Pencegahan Rasuh 1997). Tanah tidak sewenang-wenangnya dilucut hak. Ia kilanan yang mengikut undang-undang. Tiada pelanggaran perkara 13(1) Perlembagaan Persekutuan. Hal perkara kesalahan adalah tanah itu dan bukan, seperti dihujahkan oleh perayu, perbezaan jumlah antara nilai adil tanah itu dengan balasan yang telah dibayar untuknya. Perintah untuk pelucutan hak dikekalkan tertakluk kepada apa-apa caj atas tanah itu oleh bank (lihat perenggan 159–160).]]]

Notes

For cases on s 165 of the Penal Code, see 4(2) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 1784–1788.

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Arumugam Pillai v Government of Malaysia [1975] 2 MLJ 29, FC (refd)
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Bakshi Ghulam Mohd v GM Sadiq AIR 1968 Jammu & Kashmir 98, HC (refd)
Brij behari v Emperor (28) AIR 1941 Pat 539 (refd)
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Emperor v Karam Chand Gobind Ram 1944 45 Cr LJ 64 (refd)
GA Monterio v The State of Ajmer AIR 1957 SC 13, SC (refd)
HHB Gill v The King-Emperor 1947 48 Cr LJ 155, HC (refd)
Hyderabad v G Prem Raj (2010) 1 SCC 398, SC (refd)
Illian & Anor v PP [1988] 1 MLJ 421, SC (refd)
Ismail Mohamed Hajee and other v The King (28) AIR 1941 Rangoon 349 (refd)
Iun Chung Yang & anor v Superintendent of Lands and Surveys, First Division, Sarawak [1980] 2 MLJ 15, FC (refd)
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A *Jugal Singh v Emperor* AIR 1943 Pat 315, PC (refd)
Lim Kee Butt v PP [1954] 1 MLJ 35, CA (refd)
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M Karunanidhi v Union of India AIR 1979 SC 898, SC (refd)
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B (refd)
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Mohd Khir bin Toyo lwn Pendakwa Raya [2013] 4 MLJ 801, CA (refd)
C *Nanyang Manufacturing Co v The Collector of Land Revenue, Johore* [1954] 1 MLJ 69 (refd)
Nar Bahadur Bhandari etc v State Of Sikkim And Others 1998 Cr LJ 3413, SC (refd)
Nazamuddin v Queen-Empress (1901) ILR 28 Cal 344, HC (refd)
D *Ng Tiou Hong v Collector of Land Revenue, Gombak* [1984] 2 MLJ 35, FC (refd)
PP v Datuk Haji Harun bin Haji Idris (No 2) [1977] 1 MLJ 15 (refd)
PP v Fam Kim Hock [1957] 1 MLJ 20 (refd)
PP v Khairuddin [1982] 1 MLJ 331 (refd)
PP v Lim Hock Boon [2009] 3 MLJ 604, FC (refd)
E *PP v Loo Choon Fatt* [1976] 2 MLJ 256 (refd)
PP v Ottavio Quattrocchi [2004] 3 MLJ 149, FC (refd)
PP v Ottavio Quattrocchi [2003] 1 MLJ 225, HC (refd)
PP v Phee Joo Teik [1962] 28 MLJ 56, CA (refd)
PP v Zulkifli bin Arshad [2011] 1 MLJ 599, FC (refd)
F *Pentadbir Tanah Daerah Kota Tinggi v Siti Zakiyah bte Sh Abu Bakar & Ors* [2006] 2 MLJ 426, FC (refd)
Pentadbir Tanah Daerah Petaling v Glenmarie Estate Ltd [1992] 1 MLJ 331, SC (refd)
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R Balakrishna Pillai v State Of Kerala & Anr AIR 1996 SC 901, SC (refd)
R v Kenneth John Ball 35 Cr App R 164 (refd)
R v Saunders [1990] 1 SCR 1020, SC (refd)
H *Rao Shiv Bahadur Singh and another v The State Of Vindhya Pradesh* 1953 AIR 394, SC (refd)
Raja Vyricherla Narayana Gajapatiraju v The Revenue Divisional Officer, Vizagapatam [1939] AC 302, PC (refd)
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RG Jacob v Republic of India AIR 1963 SC 550 (refd)
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SN Bose v State of Bihar 1968 SCR (3) 563, SC (refd)
State Of Andhra Pradesh v C Uma Maheswara Rao & Anr (2004) 4 SCC 399, SC (refd)
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T Shankar Prasad v State Of Andhra Pradesh 2004 (3) SCC 753, SC (refd)
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Zaini bin Nyak Othman v Pendakwa Raya [1999] MLJU 375, HC (refd)

Legislation referred to

Anti-Corruption Act 1997 (repealed by Malaysian Anti-Corruption Commission Act 2009) ss 2, 36(1), 42(2), 42(3), 44, 44(1)(a)(ii), 44(2), 56
Criminal Procedure Code ss 152, 153, 154, 156, 162, 163, 293, 422
Laws of the Constitution of the State of Selangor arts 50, 53(2), (9), 63, 74
Federal Constitution arts 8, 13, 13(1)
Indian Constitution art 167
Indian Penal Code [IND] ss 21 cll (9), (12)(a), 21, Explanation, 161, 165
Malaysian Anti-Corruption Commission Act 2009 ss 3, 67, 50(3), Schedule
Offenders Compulsory Attendance Act 1954 s 5(1)
Prevention of Corruption Act 1947 [IND] s 4(1)
Prevention of Corruption Act 1988 [IND] ss 11, 20(1)
PKNS Enactment 1964 ss 4(1), 9(1), 9(3), 11, 12, 13, 17
Penal Code ss 17, 21, 21(i), Explanation, 161, 165, Illustration

Muhammad Shafee Abdullah (M Athimulan, Jahaberdeen Mohamed Yunoos, Kamarul Hisham Kamaruddin, Adzly Ab Manas, Sarah Abishegam, Mohd Ruzaini Zulkifli, Syed Muhd Ismat Syed Muhamad and Noor Farhah Mustaffa with him) (Shafee & Co and Athimulan & Co) for the appellant.
Masri bin Mohd Daud (Fadhli bin Ab Wahab with him) (Attorney General's Chambers) for the respondent.

Jeffrey Tan FCJ (delivering judgment of the court):

[1] This is the appellant's appeal against his conviction and sentence for the following offence.

> Bahawa kamu pada 29 Mei 2007 di kediaman rasmi Menteri Besar Selangor, Jalan Permata 7/1, Seksyen 7, Shah Alam, di dalam Negeri Selangor Darul Ehsan, sebagai penjawat awam iaitu Menteri Besar Kerajaan Negeri Selangor Darul Ehsan, telah mendapat untuk diri kamu dan isteri kamu, Zahrah bt Kechik (650216–08–5432), suatu barang yang berharga dengan suatu balasan yang kamu ketahui tidak mencukupi iaitu lot tanah dan sebuah rumah yang terletak di alamat No. 8 & 10, Jalan Suasa 7/11, Shah Alam, Selangor Darul Ehsan, daripada Ditamas Sdn Bhd melalui Shamsudin Bin Hayroni, Pengarah Ditamas Sdn Bhd, dengan harga RM3.5 juta sedangkan hartanah tersebut telah dibeli oleh Ditamas Sdn Bhd pada Disember 2004 dengan harga RM6.5 juta, yang mana kamu mengetahui bahawa Shamsudin Bin Hayroni mempunyai hubungan dengan kerja-kerja rasmi kamu dan oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 165 Kanun Keseksaan.

[2] Against conviction and sentence, the appellant appealed, but was unsuccessful at the Court of Appeal. Thence, the appellant appealed to this court, where, before us, learned counsel for the appellant challenged the findings of fact of the trial court, which called upon a review of the pertinent evidence.

AT THE HIGH COURT

[3] 25 witnesses were summoned by the prosecution to testify against the appellant. But only SP1, SP2 and SP3 were directly involved in the alleged transaction which formed the subject matter of the offence.

[4] It was the testimony of Saiful Aznir bin Shahabudin ('SP1') that he was the owner of land known as Lots 8 and 10, Jalan Suasa 7/L, Seksyen 7, Shah Alam together with a bungalow ('the house') erected on Lot 8 ('the said land'). The rest of the testimony of SP1 under examination-in-chief could be summarised as follows. On or about 23 December 2004, he sold the said land to Dato' Shamsuddin ('SP2') through Ditamas Sdn Bhd. Each month, he had to pay RM20,000 to the bank. To discharge that liability, he planned, in early 2004, to sell the said land. Dato' Sumadi bin Ismail, whom he had sought to find a buyer, brought SP2 in September 2004 and the appellant and wife in November 2004, as potential buyers to meet him. He had a brief discussion with the appellant. 'Mereka berada di luar rumah, mereka berada lebih kurang 10–15 minit. OKT tanya berapa saya nak jual, dan saya kata 7 juta. Kemudian dia kata terlalu mahal sebelum mereka tinggalkan rumah saya' (see p 12 of the appeal record). In November 2004, Dato' Sumadi came to his house with SP2

who inspected his house. Later, SP2 came to his house with his son. 'Selepas itu berbincang dengan harga. Saya minta RM7 juta. Selepas perbincangan, kami setuju untuk 6.5 juta untuk *both lots and house and furniture*. Kami dapat persetujuan pada bulan Disember 2004. Lot 8 lebih besar, iaitu 32000 sqft. Lot 10 ialah lot kosong. *Total land area more than 50,000 sqft*. Harga dipersetujui Lot 8 adalah 4.3 juta. Lot 10 dipersetujui adalah RM700,000. Selain itu, kita masukkan dalam *agreement furniture and fitting* yang tidak boleh dikeluarkan berjumlah 1.5 juta. Keseluruhan 6.5 juta' (see p 12 of the appeal record). On 23 December 2004, he executed P4, the agreement for sale of Lot 8, P5, the agreement for sale of Lot 10, and P6, the agreement for sale of fittings and furniture. 'P6 dijadikan perjanjian berasingan. Saya hanya ingin mendapatkan keseluruhan 6.5 juta untuk semua. Saya tak tahu kenapa mereka pecahkan. Peguam saya terangkan tiada masalah' (see p 13 of the appeal record). 'Pembeli kepada perjanjian tersebut adalah Dato' Shamsudin di atas syarikat Ditamas Sdn Bhd' (see p 14 of the appeal record).

[5] Under cross-examination, the testimony of SP1 was that he purchased Lot 8 in 1995 for RM763,000, and Lot 10 in 1996 for RM572,000. In 1995, he was a partner in the firm of Arthur Andersen. When he purchased those two lots, they were vacant land. The Oversea Union Bank provided a loan of 50%–60% of the purchase price, about RM800,000, to him to purchase the said land. In 1997, he commenced construction of the house which was completed in 1998/1999 at the cost of RM2.5m to RM3m, with a built up area of 15,000 sqft, garages, swimming pool, gazebo, a fish pool, water features including a fountain, and planter walks. He got to know Dato' Sumadi, who was a friend of his father, in 2004. His sale price of RM7m had factored in his profit. 'Saya agak harga pasaran. Saya bukan nak buat keuntungan. Syarikat saya adalah syarikat pembangunan. Saya ada idea berkaitan market value' (see p 21 of the appeal record). He had no further contact with the appellant and wife after their first meeting. Before he met SP2, he had not had the said land valued. He reached agreement with SP2 on the sale price in November/December 2004. The sale price of Lot 8, for land and house, was RM4.3m. In the memorandum of transfer, the stated consideration was RM4.3m for Lot 8 and RM700,000 for Lot 10 (see p 24 of the appeal record). The stated consideration was RM5m and not RM6.5m. He was not aware of the valuation of the said land when he sold it. He would not know if the valuation was less than his sale price. Sale price need not follow valuation. He did not know that SP2 had borrowed to pay the purchase price. He did not pay any sales commission to Dato' Sumadi. In 2010, the Malaysian Anti-Corruption Commission ('MACC') recorded his statement. He could not remember if the said land was a bumiputra lot. His sale price of the said land was reached on a willing buyer and willing seller basis (see p 28 of the appeal record).

[6] Under re-examination, the testimony of SP1 was that a market price was that as agreed between a willing buyer and a willing seller, that a professional valuer employs various methods, including the last transacted price, to impute the value of land, and that the severance of the purchase price for furniture and fittings from the stated consideration in the memorandum of transfers was not important.

[7] The testimony of Dato' Shamsuddin bin Haryoni ('SP2') was as follows. His companies were engaged in building construction and housing development. Since 1995, he had executed projects of the Selangor State Government. He got to know the appellant in 2000. He frequently met the appellant. Through one of his companies, Roniaga Sdn Bhd, he applied to the State Economic Development Corporation (PKNS) to undertake the execution of a project known as Bandar Baru Bangi Project. He handed that application ('P7') to the appellant, which was approved and later secured by an agreement ('P14') (see p 31 of the appeal record). Through another company, Bidara Lumayan, he applied to undertake the execution of a project at Cheras, Sungai Long. He knew Dato' Sumadi. Towards the end of 2004, Dato' Sumadi informed him that SP1 wanted to sell the said land. 'Saya melawat kawasan tersebut bersama Dato' Sumadi dan OKT ke rumah SP1 dan berjumpa dengan SP1' (see p 32 of the appeal records). 'Sepanjang ingatan saya, saya ada melawat 2–3 kali kawasan rumah tersebut. Setiap kali lawatan saya tak ingat dengan siapa tetapi satu lawatan ada bawa anak saya' (see p 67 of the appeal record). He was informed that the appellant had viewed the said land and was interested to purchase it (see p 67 of the appeal record). 'Selepas saya tahu OKT berminat nak beli rumah tersebut, saya Dato' Sumadi dan OKT berbincang. OKT suruh Dato' Sumadi beli rumah tersebut dan kemudian Dato' Sumadi maklumkan bahawa beliau ada banyak komitment lain. Kemudian OKT suruh saya beli rumah tersebut. Mengikut fahaman saya pada ketika itu, OKT suruh saya beli adalah kerana dia minat rumah tersebut dan mungkin dia akan beli rumah tersebut dari saya pada satu hari nanti. Semasa OKT suruh saya beli rumah tersebut, saya bersetuju. Saya seorang peniaga di Negeri Selangor dan kedudukan OKT sebagai Menteri Besar, jadi saya bersetuju sahaja apabila OKT suruh saya beli' (see p 67 of the appeal record). That meeting with Dato' Sumadi and appellant was before he met SP1. After that meeting, he proceeded, with the consent of the appellant, to purchase the said land at RM6.5m from SP1 (see p 68 of the appeal record). He signed three agreements on behalf of Ditamas Sdn Bhd. He paid a cash deposit of RM650,000. He paid the balance by cheques and bank loans. After execution of the agreements, 'kami buat ubahsuai terhadap hartanah tersebut. Ubahsuai hartanah tersebut dibuat oleh Encik Nasir. Saya ditemukan dengan Encik Nasir oleh OKT, Dato' Karim dan isteri OKT. Dalam pertemuan itu, kita bercincang pasal renovation rumah tersebut' (see p 70 of the appeal record). Dato' Karim was the political secretary of the appellant. SP3 was introduced to him as the renovation contractor. The appellant wanted SP3 as the renovation contractor. He was

given to understand that SP3 was able to 'buat Bali *style* dan telah buat rumah Dato' Karim. Hakikatnya, OKT yang melantik SP3 sebagai orang yang bertanggungjawab untuk buat renovation. Perbincangan berlaku agak lama. Banyak *point-point* yang dibangkitkan oleh OKT dan isteri untuk mencantikkan rumah tersebut pada ingatan saya, bayaran terakhir pada bulan 8 2005, pengubahsuaian berlaku pada pertengahan tahun 2006' (see p 71 appeal record). During the renovation, the appellant and wife visited the site. 'Keputusan pengubahsuaian dilakukan oleh OKT kerana beliau berminat terhadap rumah tersebut dan saya hanya penama sahaja walaupun saya ada pemilik banglo tersebut' (see p 71 of the appeal record). The appellant instructed SP3 to deal with him ('SP2') on the matter of the renovation. He paid RM1.5m to SP3 towards the renovation. 'Pada pendapat saya, proses ubahsuai patut dibayar oleh OKT. RM1.5m tidak dibayar semula oleh OKT kepada saya ... bila RM1.5m tidak dibayar semula saya *presume* dia akan bayar semula semasa jual beli' (see p 72 of the appeal record). The appellant indicated that he wanted a sale of the said land to him at RM3.5m. He did not agree, as the offer was too low. He proposed RM5m–RM5.5m 'kerana ingin beri potongan sedikit mengambil kira harga tanah dan *cost renovation* saya' (see p 72 of the appeal record). 'OKT ada maklumkan bahawa dia hanya boleh beli dengan harga 3.5 juta dan itulah kelayakan yang dia boleh beli. Setelah berbincang dengan isteri, saya memandangkan kami ada syarikat di Selangor dan seorang Menteri Besar inginkan rumah dengan harga 3.5 juta, kami setuju kerana takut kedudukan saya sebagai *businessman* di Selangor tergugat' (see p 73 of the appeal record). His valuer valued the said land at RM5.5m. On 29 May 2007, he sold the said land to the appellant and wife at RM3.5m, which was paid by two cheques. P33 and P34 were the memorandum of transfers of the said land to the appellant and wife for RM3.5m. An officer from the valuation department asked him whether he truly intended to sell at that price which was lower than his purchase price. 'Saya ada nyatakan ada sebab apa saya ingin jual. Saya tak maklumkan kenapa terpaksa jual. Hal yang saya maklumkan kerana tiada *option* atau pilihan. Saya terpaksa menjual kepada seorang Menteri Besar dan saya *businessman* di Selangor dan takut terganggu dan itu sebab saya buat *option* tersebut' (see p 4 of the appeal record).

[8] Under cross-examination, the testimony of SP2 was as follows. When he dealt with the appellant, the appellant was Chairman of PKNS and PKNSB (both state corporations). His companies, Majulia, Roniaga and Bidara Lumayan, had not defaulted on their agreements with state corporations. In relation to the projects undertaken by his companies, he dealt with the staff of the state corporations. Sometimes, he would contact the appellant. Together with Dato' Sumadi, he viewed the said land. Dato' Sumadi informed him that the appellant wanted to buy the said land. At one meeting between him, Dato' Sumadi, appellant and wife, the appellant asked Dato' Sumadi to buy the said land. When Dato' Sumadi said he had other commitments, the appellant asked him to buy the said land – 'Din kau belilah' (see p 123 of the appeal record).

The appellant proposed renovation in Bali style after he (SP2) had paid the full purchase price to SP1. When he bought the said land from SP1, he knew that there was a risk that the appellant might not buy the said land from him. But later he knew that the appellant had every intention to buy the said land when the appellant instructed SP3 on the renovation to be carried out.The price of RM3.5m in 2007 was very low. He paid RM1.5m towards the renovation of the house. His purchase price of RM6.5m from SP1 was fair (see explanation of SP2 at p 129 of the appeal record). He was not happy with the appellant's offer of RM3.5m. For that reason, in May 2007, he had the said land valued, when renovation was in progress. He told the appellant that his offer of RM3.5m was too low (see p 143 of the appeal record). SP2 disagreed that he purchased the said land and renovated the house to win the appellant's favour, or that his story that the appellant instructed renovation and instructed SP3 to liase with him (SP2) was a concoction. SP2 maintained that he had no choice but to deal with the said land as directed by the appellant. SP2 said that it was not true that he sold the said land to the appellant at RM3.5m to cut losses.

[9] Under re-examination, SP2 said that when he was asked to give his statement to the MACC, the appellant asked him not to involve him (the appellant). The appellant gave an assurance that he (the appellant) would 'control' the case, that there would not be any prosecution, and that he ('SP2') would only be required to give a witness statement. The appellant assured him 'don't worry, we will solve it' (see p 149 of the appeal record). One day, he was served with an indictment. He did not understand why he was charged. He purchased the said land on the instruction of the appellant. He did not ask for receipts for his payments towards the costs of renovation, as SP3 was a bankrupt and the renovation costs were reasonable. His risk in the purchase of the said land was that the appellant might not purchase the said land from him, in which case he would have to sell it to others.

[10] Under further cross-examination, the testimony of SP2 was as follows. He had not given false statements to the MACC. SP3 was appointed by the appellant. He agreed that he gave a false statement (inconsistencies) because of pressure applied by the appellant – 'kamu bersetuju untuk buat kenyataan palsu kerana desakan dari OKT? Betul, atas desakan OKT' (see p 151 of the appeal record). He disagreed that he would lie when it would be to his advantage. He disagreed that pressure had not been applied by the appellant.

[11] The testimony of Nasir bin Ismail ('SP3') was as follows. Since 2004, he helped his wife in her business in Lina Ubersari Bali Landscape and Pottery. He was a bankrupt from 1998–2008. In 2006, he got to know Dato' Karim. He had carried out landscaping works, in Bali style, for Dato' Karim. One day, Dato' Karim informed him that the appellant liked his landscaping works at Dato' Karim's house and wanted to meet him. He went to 8, Jalan Suasa, Shah

Alam. There, he met the appellant and wife, SP2, and Dato' Karim. Dato' Karim introduced him to the appellant – 'Saya diperkenalkan oleh Dato' Karim kepada OKT untuk OKT ubah rumah No 8 dia mengikut konsep Bali. OKT yang maklumkan sendiri. Dia suruh ubah taman sekali' (see p 35 of the appeal record). The appellant asked when renovation could be completed. He said 1–2 years. The issue of renovation costs was not raised. 'Dalam perjumpaan tersebut, yang paling banyak bercakap adalah OKT dan isteri. Dato' Shamsudin ada bercakap, tetapi saya tidak berapa ingat apa yang dia cakapkan. Pada perjumpaan pertama, impresi saya rumah tersebut adalah rumah OKT. Selepas itu Dato' Shamsudin kata itu adalah rumah syarikatnya. Impresi awalnya saya katakan itu rumah OKT, kerana OKT dan isteri yang banyak bercakap' (see p 35 of the appeal record). 'Selepas perjumpaan tersebut, ada *follow up*. Saya minta OKT bagi sedikit wang untuk saya mulakan kerja. Permintaan juga berlaku di tempat yang sama selepas perjumpaan tiga jam kerana ingin beli barang. Saya minta RM250,000 lebih kurang. OKT maklumkan 'OK, as long as you can deliver'. Saya dapat duit itu pada bulan Mac atau April. Saya dapat duit itu di kediaman rasmi OKT sendiri. OKT yang serahkan wang pendahuluan tersebut kepada saya. Saya tak perasan jika ada sesiapa yang lihat. Serahan dalam bentuk tunai' (see pp 35–36 of the appeal record). He did not give his receipt. After that, he proceeded to the Insolvency Department to obtain its consent for a passport to be issued to him for travel to Bali to buy material. On all technical matters, the appellant instructed him to deal with SP2. He commenced renovation after he returned from Bali. 'Saya buat pagar, cat, buat tambahan, pecah mana yang patut dan banyak lagi. Teknikal terlalu banyak. Dalam proses pengubahsuaian, saya berhubung dengan Dato' Shamsudin. Payment lebih kurang 4–5 kali Dato' Shamsudin yang uruskan. Bila perlu *payment*, saya bagi tahu Dato' Shamsudin dan dia datang *site*. Dia kata akan bagi tahu OKT kemudian bagi duit. Sekali serah, jumlahnya RM500,000. Ada di *site* di luar pun ada' (see p 37 of the appeal record). 'Penyerahan ini dibuat oleh Dato' Shamsudin berlaku 4–5 kali dan kemudian bagi selebihnya. OKT suruh saya ke kediamannya bagi selebihnya. Saya ke rumah OKT untuk ambil duit kerja. Setiap serahan RM500,000 lebih kurang 7–8 kali. Serahan itu sepanjang masa di rumah OKT. Tiada orang nampak, semua tunai' (see p 37 of the appeal record). The appellant visited the renovation site about 2–3 times. 'Secara keseluruhan, jumlah yang diterima oleh saya lebih kurang RM6 juta. Secara kasarnya, rumah tersebut siap pada tahun 2008 atau 2009' (see p 38 of the appeal record).

[12] Under cross-examination, the testimony of SP3 was as follows. He went to Bali in March or April of 2006. He used his wife's company to execute the renovation. In 2006, he received three or four payments of RM500,000 each from SP2. He gave his statement to the MACC. It was the appellant who instructed 'buat tambah atau pecah' (see p 61 of the appeal record). He disagreed that his meeting with the appellant was in May 2007 and not March 2006. He maintained that at the official residence of the Menteri Besar, the

appellant paid 7–8 payments to him (see pp 63–64 of the appeal record). He disagreed that the total costs of renovation only amounted to RM1.5m (see p 64 of the appeal record).

[13] Under re-examination, the testimony of SP3 was as follows. D19, the agreement for the renovation works, came into being 'semasa OKT ingin buat perjanjian dengan Ditamas Sdn Bhd sebab dia nak *quotation* harga sebagai *formality* kepada kerajaan ... OKT suruh letakkan RM600,000 tersebut' (see pp 64–65 of the appeal record). 'Semasa D19 dibuat, anggaran kasar bayaran yang telah dibayar adalah lebih kurang RM4 juta. Selepas D19 ini dibuat, baki bayaran yang masih diterima adalah RM2 juta lebih' (see p 65 of the appeal record).

[14] The pertinent testimony of the other prosecution witnesses, including SP7 and SP9 from the valuation department and professional valuers (SP8 and SP10), would be related in the course of these grounds. But basically, on the basis of the testimony of SP1, SP2 and SP3, and three documents, namely P12, whereon the appellant endorsed 'Permohonan ini disokong dan harap tiada halangan' on the application of Roniaga to develop state land, P28A, whereon the appellant endorsed 'Saya setuju untuk dilepaskan dari Performance Bond' on Roniaga's application to be dispensed with the requirement to provide a performance bond, and P15A, which was an extension of time granted to Roniaga by a meeting chaired by the appellant, the trial court held (i) the consideration of RM6.5m between SP1 and SP2 was on a willing buyer and willing seller basis (see para 10 of the grounds of the trial court), (ii) the consideration of RM3.5m between SP2 and the appellant was not the fair market value of the said land (see para 9), (iii) the appellant knew that RM7m was the asking price of SP1 (see para 11), (iv) it could be inferred that the appellant knew that SP2 had paid RM6.5m to buy the said land (see para 16), (v) the appellant instructed execution of renovation even before transfer of the said land to him (see para 18), (vi) it was the appellant who appointed SP3 to execute the renovation (see para 20), (vii) D19 was made at the insistence of the appellant, that is, after RM4m had been paid to SP3 towards renovation, but before a further RM2m was paid to SP3 towards renovation (see para 23), (ix) the appellant knew that SP2 had business dealings with him in his official position (see paras 26–27), (x) SP3 was not an accomplice but one who was forced to sell the said land at RM3.5m to the appellant (see para 29), and, (xi) the contradictions between the testimony of SP2 and his statements to the MACC were satisfactorily explained by SP2 who related that his statement to the MACC was so made on account of the assurances given by the appellant (see para 31). The trial court held that a prima facie case had been made out.

DEFENCE

[15] The testimony of the appellant was as follows. Between 24 August 2000–8 March 2008, he was the Menteri Besar of Selangor. Before 29 May 2007, he did not know Ditamas Sdn Bhd. He only got to know Ditamas when he entered into his purchase of the said land. Before May 2007, he was not aware of the existence of Ditamas, he did not know that Ditamas had bought the said land at RM6.5m from SP1 or that Ditamas had executed projects for PKNS. Ditamas had no interaction with him as Menteri Besar or as Chairman of PKNS. Dato' Sumadi was his political friend and ally. He had no knowledge of the relationship between Dato' Sumadi and SP2. As Menteri Besar, he got to know many developers and entrepreneurs in Selangor, including SP2 who was not a personal friend. In September 2004, Dato' Sumadi brought him to meet SP1 – 'perjumpaan tersebut untuk melawat rumah Encik Saiful' (see p 276 of the appeal record). He had informed Dato' Sumadi that he wanted to build his house in Bangi. Dato' Sumadi informed him that his friend's house in Shah Alam was for sale. One evening, Dato' Sumadi brought him to view the house. He met SP1 who took him around the exterior of the house. 'Kemudian ketika saya hendak balik saya ada bertanya dengan Encik Saiful Aznir berapa rumah ingin ditawarkan oleh Encik Saiful. Encik Saiful ada beritahu saya iaitu, RM7 juta. Dalam perjalanan ke kereta, saya beritahu Saiful 'mahal sangat' dan kemudiannya, saya masuk ke kereta dan tiada tawar-menawar dan selanjutnya, saya tidak pernah menghubungi atau berjumpa dengan Encik Saiful Aznir dan saya tidak ingat rumah itu selepas itu' (see p 276 of the appeal record). On the way back, he said to Dato' Sumadi 'kenapa mahal sangat' (see p 277 of the appeal record). In early 2004, there was no meeting between Dato' Sumadi, SP2 and him on the subject of the said land. He had not viewed the house with SP2, Dato' Sumadi or met SP1. He had not instructed Dato' Sumadi or SP2 to purchase the said land. At no time did SP2 inform him that he would buy the said land at RM6.5m. He did not know when SP2 bought the said land. After one of his monthly meeting with contractors where he disclosed that he intended to build a house in Bangi for his family, SP2 brought him to view the said land. After that, he met SP2 who informed him that he (SP2) wanted to sell the said land to him (the appellant) at RM5m. At 4pm on that day, SP2 brought him to view the said land, whence he realised that the said land was the same land that he viewed in 2004. The structure was different. 'Yang saya lawat bersama Dato' Shamsuddin adalah rangka rumah yang tiada pintu, tiada tingkap, tiada lantai, tiada ceiling, tiada furniture, tiada landskap, tiada bekalan air dan tiada bekalan api. Itu adalah berbeza dengan rumah yang dilawat 2004' (see p 278 of the appeal record). He was informed that the house was not complete. He said that it was best that the price be determined by a valuer. When he first viewed the said land in 2004, there was a complete house with a beautiful garden, then occupied by SP1. When SP2 said that his price was RM5m, he said that the house was not complete and therefore difficult to value. He said that the said land should be valued by an independent valuer.

SP2 agreed. The price proposed by SP2 was not at a discount. After he instructed a valuation to be carried out, he contacted the HSBC Bank. He instructed the bank to value the said land. He informed SP2 that officers from the bank and Rahim & Co would inspect the said land. He was informed that Rahim & Co had valued the said land at RM3.5m. He informed SP2. He asked SP2 whether he (SP2) wanted to proceed with sale. SP2 agreed. Both parties agreed to the market value at RM3.5m. He signed the sale and purchase agreement. He paid RM500,000 to SP2. The balance was paid by the bank. Before execution of the sale and purchase agreement, SP2 never said that RM3.5m was inadequate. He had not forced SP2 to agree to RM3.5m. He did not say to Dato' Sumadi that he (the appellant) wanted the said land. Before 2007, he had not said to SP2 that he wanted to buy the said land. Before 2006, he did not know that SP2 expanded monies to demolish and rebuild on the said land. SP2 had not asked for RM1.5m that was supposedly expended towards renovation. When he bought the said land in 2007, the house was about 50%–60% complete. It was totally different from the structure he viewed in 2004. 'Bila rumah belum siap, ini beri peluang kepada saya untuk siapkan rumah tersebut mengikut kehendak saya. Saya minat bina rumah ikut citarasa orang Jawa' (see p 281 of the appeal record). The incomplete structure was about 80% of what he had in mind. He said to SP2 'saya Menteri Besar kalau tak ikut *professional*, jadi isu' (see p 281 of the appeal record). SP2 agreed to follow market value. He got to know SP2 in 1997, when the Prime Minister praised Syarikat Majulia which belonged to SP2. There was no favouritism when he agreed to waive the performance bond of Roniaga, for it was a decision of the board. He only endorsed his support as a matter of course. It was usual for him to give his support – 'di sokong dan harap tiada halangan' – on average about 10–15 a day, to companies. He did not know that SP2 owned Roniaga (see p 282 of the appeal record). He had not instructed SP2 to execute renovation in 2006. 'Saya tidak pernah pada September 2004 sehingga 2007 pergi ke rumah itu' (see p 285 of the appeal record). After SP2 had executed the sale and purchase agreement, he sought out many contractors, but they were not prepared to complete the structure. He met SP3 who agreed to complete the structure for RM600,000. He paid RM400,000 to SP3. RM200,000 was not paid, as there were incomplete works. After the basic structure was completed, he commenced variation works incorporating Javanese features. In total, he paid RM1.5m. 'Saya belum bayar RM200,000. Dia ada menuntut, tetapi setengah kerja yang dibuat termasuk elektrikal, saya suruh dia ganti, dia tak mahu. Saya terpaksa menukar *power gate* untuk elakkan beliau masuk dalam rumah saya selepas pergaduhan besar dan beliau bawa keluar barang dari rumah saya' (see p 286 of the appeal record). There was no meeting with SP3 in April 2006. After execution of the sale and purchase agreement, there was a meeting between him, his wife and SP3. He instructed SP3 to execute the work. He had not instructed SP3 to deal with SP2, or paid RM200,000 to SP3 in 2006, or indicated the things he wanted from Bali. He had not forced SP2 not to incriminate him (the appellant) when SP2 was asked in 2009 to give a

statement to the MACC. When he said 'don't worry, we will solve it', he meant that they would prove they did nothing wrong. On 23 December 2004, he did not know that SP2 had purchased the said land at RM6.5m. He did not know the market value of the said land in 2004. D19 was entered into after his purchase of the said land from Ditamas. Pursuant to D19, SP3 agreed to complete the wiring, tiling, timber flooring and painting works for RM600,000. Payment for landscaping and decorative works was on a cash basis. The costs of mobile and fixed furniture amounted to RM1.5m. SP3, asked, but he refused to pay RM200,000 as the wiring was unsatisfactory. He paid RM400,000 by cheques and RM1.5m by cash to SP3. SP3 did not complete the works. He stopped the works in early 2009. When he refused payment, SP3 entered the said land at night and removed the mobile furniture. He was forced to change the gate. It was not a small misunderstanding between him and SP3, as the house could not be occupied without proper wiring. He was not aware if SP2 had dealings which involved his official duties. He only gave his support to all contractors, developers and entrepreneurs in Selangor. 'Ini merupakan amalan biasa di Negara kita. Peniaga, *developer* dan kontraktor akan berjumpa melalui pejabat untuk dapatkan sokongan dari pemimpin, pegawai kewangan negeri, ketua jabatan dan pengarah syarikat. Ini adalah amalan biasa' (see p 292 of the appeal record). There was no meeting between him, SP2 and Dato' Sumadi in early 2004. It was not true that he knew that SP2 had contacted SP1 on the purchase of the said land at RM6.5m. There was no discussion between him and wife, Dato' Karim, SP2, and SP3 on the renovation. The first time he met SP3 was in 2004, in Dato' Karim's house. At that time, SP3 was carrying out work at Dato' Karim's house. He and his wife were not present at the said land when it was renovated in 2006. SP2 fabricated the story when he (SP2) was charged. SP3 said that the renovation was in 2006 because he (SP3) had a quarrel with him. SP2 wanted to embarrass him (the appellant) when he was charged. He had not paid an advance of RM250,000 to SP3 in 2005. His first payment to SP3 was after D19. SP3 had not gone to Bali. He did not know when the original house was demolished. When he and SP2 viewed the said land in April 2007, the original fixtures and fittings were no longer there. He did not know the market value of the said land with the incomplete house. He had no idea of the value of a comparable property. SP2 was a willing seller and he was a willing buyer. He believed that the said land was worth RM3.5m, as the house was incomplete and the bank had valued it at RM3.5m. He relied on the value of the valuer. 'Saya tidak ada cara lain untuk mengetahui bahawa harga rumah yang saya beli sebagai tidak cukup' (see p 296 of the appeal record).

[16] Under cross-examination, the testimony of the appellant was as follows. As Menteri Besar, he was not an influential person, as there were matters that did not involve him. Many contractors knew him as the Menteri Besar 'tiada hubungan rasmi dan *specific*'. His support for contractors was 'prosedur biasa'. He viewed the said land in April 2004 and in September 2007. On his way

back, 'saya kata, rumah itu mahal sangat' (see p 298 of the appeal record). He was not interested in the said land as he did not like the structure. He did not know that SP2 had viewed the said land. He denied he had an interest in the said land or that there was a meeting between Dato' Sumadi, SP2 and him on the subject of purchase of the said land, that he asked Dato' Sumadi to buy the said land but when Dato' Sumadi declined to do so he asked SP2 to buy the said land, that he discussed the purchase of the land by SP2 at RM6.5m, that SP2 informed him that SP1 had asked for RM6.5m, or that Dato' Sumadi was more than just a political ally. He denied that he wanted the renovation with Bali style features. He first met SP3 in 2005 in Dato' Karim's house. When he was with SP2 and Dato' Karim in March/April 2006, he had not given his instructions or his views on the renovation or appointed SP3 as the renovation contractor. He denied that he instructed the renovation, albeit that the said land was purchased by SP2 or that he instructed SP3 to deal with SP2, that SP2 represented him on the execution of the renovation, that SP3 asked and he gave an advance of RM250,000 to SP3, or that SP2 paid RM1.5m to SP3 and informed him of that payment. He said he had not reported the taking away of the mobile furniture by SP3 as he did not want to tarnish the image of the Menteri Besar.

[17] Under challenge, the appellant maintained that D19 was a genuine agreement, that the total renovation costs paid by him was as per his testimony, that SP2 willingly sold the said land to him, and that the consideration was fixed by Rahim & Co (see pp 303–306). Nonetheless, the appellant agreed that SP2 did not agree to his purchase price of RM3.5m, and that SP2 wanted to sell the said land at RM5m–RM5.5m (see p 306 of the appeal record). The appellant denied that he knew that SP2 had business dealings with the Selangor State Government or that SP2 sold the said land to him (the appellant) out of (SP2) fear that his (SP2) business with the State would otherwise be adversely affected, or that he knew that SP2 had purchased the said land at RM6.5m. He maintained that RM3.5m was adequate consideration, as that was the value of a valuer. He denied that it was him (the appellant) who determined or influenced the value of the said land at RM3.5m, that he knew that SP2 had the said land valued at RM5m–RM5.5m, or that SP2 said that his (the appellant) offer of RM3.5m was too low. He however agreed that SP2 would not sell the said land at a loss (see p 311 of the appeal record). In 2002, he got to know SP2 as the owner of Majulia. He denied that SP2 had official business with PKNS (see p 313 of the appeal record). He maintained that his support to companies was regular. He denied that his story was a fabrication.

[18] Under re-examination, the testimony of the appellant was as follows. His first meeting with SP3 was after his purchase of the said land. Before that,

he met SP3 in 2005 in Dato' Karim's house. In his opinion, Roniaga had a good track record. Rahim & Co was appointed by HSBC. He had not influenced Rahim & Co.

[19] The appellant summoned four witnesses to testify for him. Hasnah bt Abu Hassan ('SD2'), a secretarial assistant at the Selangor State Secretariat from 2000–2008 affirmed that P12 was a 'surat sokongan biasa dari Pejabat MB' (see p 323 of the appeal record). Under cross-examination, SD2 said that she knew that SP2 had official business at the State Secretary's office (see p 326 of the appeal record). Mohd Tajudin bin Mohd Ali ('SD3'), an officer of the Maybank, produced the cheque issued by the appellant to SP3. Irhamy bin Ahmad ('SD4'), a valuer from Irhamy & Co said he was instructed by Ditamas to value Lot 8. He visited the site on 10 May 2005. 'Secara keseluruhan, nilaian adalah RM4.3m. Pada pendapat saya, harga RM6.5 juta adalah tidak berpatutan dengan jualan rumah tersebut. Ini kerana RM6.5 juta, pada pendapat saya adalah terlalu tinggi' (see p 333 of the appeal record). Under cross-examination, SD4 agreed that sale price need not follow market value. SD4 also said that the price of RM6.5m was not too high (see p 340 of the appeal record).

[20] Choy Yue Kwong ('SD5'), the managing director of Rahim & Co, rendered the following testimony. D58 was his valuation of Lots 8 and 10 which was prepared on the instruction of HSBC. 'D58 was prepared under the instruction of HSBC, PJ Branch. I was instructed to value the market value of PT62 and PT65 on as it is basis' (see p 345 of the appeal record). He visited the site on 14 May 2007. On that day, he met the appellant at the official residence of the Menteri Besar. SP2 was there. When he visited the site, his impression was that the house had been demolished and a house was under construction (see p 346 of the appeal record). 'I used the comparison approach. For this particular property, building unfinished under construction, when we use this method, we compare the land and used the sale evidence of the land to get the market value of the land. Then, we assessed the cost that is needed to construct at that stage to arrive at the building value. We used the building cost to come at the value and we combined the building value and land value to come to the market value' (see pp 347–348 of the appeal record). He only relied on data from the valuation department. 'That was the only data available to me from JPPH. I was aware of the transaction of this property and I have knowledge, it was a new house at the time of transaction. What I saw, was the house under construction and that was why I did not state in my valuation' (see p 348 of the appeal record). 'For PT62, where the building situated, I valued the land RM45 per sqft and that gave me a value RM1,430,730. PT65, area of 20,437 sqft mainly used for facilities and garden and I valued at RM40 per/sqft and gave me the value of RM817,080. For the building at that stage of construction, I have assigned RM80 per/sqft at this structure/semi completed.

Main Floor Area (MFA) is 12,970 sqft and I cite RM80 per/sqft, to arrive at RM1,037,600. Ancillary floor area, 2,840 sqft and I cite RM50 per/sqft, to arrive at RM142,000. Novar porch, new gazebo, ex-waqaf and swimming pool, I gave the total value for this part of the building 148,430 to arrive at RM1,328,030. Total value of land plus building is RM3,575,840. Having done that, I round it down to RM3.5m because I have excluded car porch and gazebo because there were not in the plan and I also take more on negative view of property under construction because buying a property under construction is more risky compared to buying the completed one' (see p 349 of the appeal record). Market value need not be the market price, but market price might be an indicator of market value. A buyer willing to buy at RM5m–RM5.5m would not be a prudent buyer. The appellant did not inform him of his purchase price. His valuation was dated 19 May 2007. It was difficult to value the building at 50%–60% completion. 'My valuation is at it is basis' (see p 352 of the appeal record).

[21] Under cross-examination, the testimony of SD5 was as follows. On 14 May 2007, he knew for the first time that the buyer was the Menteri Besar of Selangor (see p 355 of the appeal record). He subsequently knew the amount of loan applied by the appellant. SD5 disagreed that the appellant indicated the amount of loan and or the value of the said land. The prices of land from 2004–2007 were stable. There was no definite trend, as some prices were higher while some prices were lower. He did not check the transactions in the Land Office in 2007 before he put up his report (see p 363 of the appeal record). SD5 rigorously defended his valuation report.

[22] Under re-examination, the testimony of SD5 was that the valuation of other valuers was higher as they were made after the building was completed, whereas his report was made when it was a semi-completed building (see p 370 of the appeal record).

[23] At paras 35–36 of its grounds, the trial court first summarised the salient evidence of the defence. Then the trial court held (i) there was no reason for SP2 to sell the said land at RM3.5m when he had purchased it at RM6.5m (see para 41), (ii) the reason proffered by the defence for the sale to the appellant, 'to cut losses', was in the absence of evidence that SP2 was in financial straits (see para 41), (iii) (SD4 and SD5) could only testify on the market value but not on the price paid by SP2 to SP1 on a willing buyer and willing seller basis (see para 43), (iv) the market value might be relevant only if the appellant had not viewed the said land and had not been informed of SP1's asking price (see para 43), (v) there was no evidence that SP2 knew SP3, (vi) it was Dato Karim, the political secretary of the appellant, who introduced SP3 to SP2 (see para 43), (vii) from the start, it was the appellant who appointed SP3 as the renovation contractor (see para 43), (viii) there was no reason to rule

against the credibility of SP3, when given that only one question was asked by the defence on the 'disagreement' between the appellant and SP3, and no question was asked by the defence on the alleged taking out of the mobile furniture by SP3 (see paras 44–45), (ix) the alleged taking out of the mobile furniture by SP3 was an afterthought (see para 47), (x) SP3 was a reliable witness (see para 48), and, (xi) the appellant had not cast a reasonable doubt on the prosecution case (see para 50). The trial court recorded a conviction and handed down a one year term of imprisonment. Pursuant to s 36(1) of the APR 1997, the trial court also ordered the said land to be forfeited.

AT THE COURT OF APPEAL

[24] At the Court of Appeal, the appellant raised multifarious arguments, which the Court of Appeal duly considered under the following seven main issues/questions (see *Mohd Khir bin Toyo lwn Pendakwa Raya* [2013] 4 MLJ 801, at para 28):

(a) whether the appellant was a public servant;

(b) whether RM3.5m was insufficient consideration;

(c) whether the appellant as a civil servant had any official dealings with SP2 and whether the appellant knew that SP2 had official dealings that pertained to his official duties;

(d) whether SP2 was an accomplice;

(e) the credibility of SP3;

(f) whether the defence had raised a reasonable doubt; and

(g) the sentence.

[25] In relation to those seven main issues/questions, the Court of Appeal reasoned as follows:

Issue / question (a): Whether the appellant was a public servant

[26] It must be proved that the appellant was a public servant at the material time. The trial court held that the appellant was a public servant, but failed to give any reason for its finding, except for the fact that the appellant was the Menteri Besar of Selangor. The particulars of the charge read that the appellant, as Menteri Besar, was a public servant. Nonetheless, the case of the prosecution was that the appellant, by virtue of him being the Menteri Besar, was also Chairman of PKNS, and that the charge related to the official duties and functions of the appellant as Chairman of PKNS at the material time. As Chairman of PKNS, the appellant was a public servant, by reason of ss 11, 12, 13, and 17 of the PKNS Enactment 1964 and s 21 of the Penal Code ('the

Code'), when read together with and in the context of s 165 of the Code. Sections 4(1) and 9(3) of the PKNS Enactment 1964 and *Public Prosecutor v Phee Joo Teik* [1962] 1 MLJ 56 supported the finding that the appellant was a public servant. Any misdirection or non-direction by the trial court in not giving reasons for the finding that the appellant was a public servant, and any error of omission in the charge in not stating that the appellant was the Chairman of PKNS, had not occasioned any miscarriage of justice.

Issue / question (b): Whether RM3.5m was insufficient consideration

[27] The Illustrations to s 165 of the Code ('the Code') are examples of legal principles, and are not exhaustive. The valuation reports produced could not bind the court on the question of the adequacy or inadequacy of the consideration. Moreover, D58 was prepared for the purpose of a loan sought by the appellant and wife. The consideration of RM3.5m was inadequate. Section 165 of the Code must be interpreted according to its plain language, which section is intended to prevent public servants from circumventing the prohibition against taking or receiving gratification by taking or receiving valuable gifts. The evidence showed that right from the start the appellant was interested in the said land. On that, the trial court had carefully weighed the entire evidence, from the first visit to the said land in 2004, the reaction of the appellant that the price asked by SP1 was too high, the visit to the said land by Dato' Sumadi and SP2, the information to SP2 that the appellant was interested in the said land, the meeting where the appellant asked SP2 to buy the said land, the offer of SP2 in 2007 to sell the said land to the appellant at RM5m–RM5.5m, the counter-offer of the appellant, and, the valuation commissioned by SP2. The evidence was clear that SP2 had agreed to sell the said land at RM3.5m to the appellant, out of apprehension that his (SP2) position in Selangor would be otherwise be adversely affected if he were to insist on RM5m–5.5m. The appellant wanted to renovate the house and appointed SP3 as the renovation contractor even before he was registered as the owner. RM3.5m was inadequate consideration. The trial judge had considered all factors when he came to that finding which was supported by the evidence. There was no reason to reverse the finding of the trial judge. It was clear that the appellant knew that RM3.5m was inadequate consideration.

Issue / question (c): Whether the appellant as a civil servant had any official dealings with SP2 and whether the appellant knew that SP2 had official dealings that pertained to his official duties

[28] That SP2 had official business with the appellant was proved by the application of Roniaga that bore the endorsement of the appellant. The relationship between SP2 and the appellant in his capacity as Chairman of PKNS was also proved by the joint-venture between PKNS and Roniaga dated 9 May 2002. Although the seller was Ditamas, SP2 was the director of Ditamas

who transacted the sale of the said land to the appellant. The trial court was correct to find that SP2, through his companies, had dealings with the appellant in his official capacity.

Issue / question (d): Whether SP2 was an accomplice

[29] It is a question of fact as to whether one is an accomplice. The evidence was that SP2 had purchased the said land from SP1 at RM6.5m, and that when the appellant wanted to buy the said land, SP2 did not agree with the appellant's offer of RM3.5m. SP2 was forced to accept the offer of the appellant by reason of his business dealings with the PKNS where the appellant was chairman. Under the circumstances, SP2 was not an accomplice, as he had no choice but to sell to the appellant to avoid any adverse consequence to his business. SP2 was not a willing participant. Section 44 of the Anti-Corruption Act 1997 ('the ACA 1997') was applicable. Pursuant to s 2 of the ACA 1997, an offence under s 165 was a schedule offence. SP2 could not be considered as an accomplice. On the supposed inconsistencies in the testimony of SP2, the trial court was entitled to accept the explanation of SP2. There is no principle of law to say that the evidence of a witness must be wholly accepted or rejected. The court could accept a part of the testimony.

Issue / question (e): The credibility of SP3

[30] The testimony of SP3 was that D19 was made at the request of the appellant, and that he ('SP3') had already commenced renovation as directed by the appellant since April 2006. That testimony was supported by the unchallenged testimony of SP19 who said that he was the project manager of the house since March 2006. That the renovation commenced since March 2006 was supported by P16 dated April 2006, which was the plan submitted by SP3 to the Majlis Perbandaran Shah Alam. There was no reason not to accept the testimony of SP3 on D19, or the credibility of SP3.

Issue / question (f): Whether the defence had raised a reasonable doubt

[31] The appellant denied knowledge that SP2 had official dealings with him in his capacity as Chairman of PKNS. The appellant said that he only knew SP2 in 1997, at the opening of Stadium Kuala Selangor where the Prime Minister praised Majulia, a company that belonged to SP2, and where SP2 gave a calling card under Majulia, to him. The appellant admitted that he knew that SP2 was a contractor in Selangor. The appellant denied ever having met SP2 at his office or having received P12 and P28A from Roniaga. The appellant also denied knowledge of the relationship between SP2 and Roniaga. The denial of the appellant was without basis. The defence could not be believed, as it was proved that the appellant had supported the application of Roniaga in 2000 and 2001. The appellant denied that he knew that SP2 had purchased the

said land at RM6.5m from SP1. But given that the appellant had showed an interest in the said land right from the start, it was not reasonable that the appellant would not have asked the price that SP2 had purchased the said land from SP1. The appellant denied that he appointed SP3 in March 2006. The appellant contended that he only appointed SP3 when D19 was executed on 6 June 2007. The evidence was that right from the start SP3 was under the direction of the appellant who paid an advance of RM250,000 to SP3 in March 2006. D19 was not an agreement to commence the renovation. Rather, D19 was an agreement to complete the remainder works. D19 did not contradict the evidence that the appellant had commenced and obtained the services of SP3 since March 2006. The appellant denied that the price of RM3.5m 'adalah harga yang ditetapkannya mengikut kelayakan'. The appellant contended that RM3.5m was based on the market price agreed by SP2, and the valuation of Rahim & Co. The trial court found that SP2 did not agree with the offer of the appellant, and that there was no reason why SP2 who bought the said land at RM6.5m would sell it at RM3.5m. The trial court had considered the evidence of the defence witnesses. But the testimony of SD2 contradicted the appellant. The testimony of SD2 was that on a number of occasions, she met the appellant at the office of the Menteri Besar, and that SP2 could have personally handed P12 and P28A to the appellant, as the official endorsement of receipt was not found on P12 and P28A. The trial court was right to hold that the bench mark was not the market price but the price paid by SP2 to SP1 on a willing seller willing buyer basis, that the market price would be only relevant if the appellant had not viewed the land and did not know the price asked by SP1, and that it was the appellant who appointed SP3 right from the start. Those findings of the trial court were all supported by evidence. There was no appealable error. The appellant was guilty as charged.

Issue / question (g): The sentence

[32] The offence was serious. As Menteri Besar and also Chairman of PKNS, the appellant should set an example. There were no extenuating circumstances for the offence. The trial court was right to pass a custodial sentence. Section 36(1) read together with s 56 of the ACA 1997provided for forfeiture of the subject property. The order of forfeiture of the trial judge was correct.

AT THE FEDERAL COURT

[33] Before us, learned counsel for the appellant tendered a written 'outline of (7) issues' to argue against conviction and forfeiture of the said land. On the first issue as to whether the appellant was a public servant, it was submitted that the appellant was not a public servant within the meaning of ss 21(i) and/or 165 of the Code. On the second issue that pertained to proof of the charge, it was contended: the prosecution failed to prove the connection between SP2 and appellant as required by s 165 of the Code; the courts below erred in law in

not considering the utility of the illustrations of s 165 of the Code; the illustrations to s 165 of the Code are authentic declarations of the scope and purpose of the law; and, the failure by the courts below in not applying the illustrations when assessing the essential ingredients of the offence amounted to a serious misdirection by way of a non-direction. On the third issue as to whether RM3.5m was adequate consideration, it was argued: the Court of Appeal was wrong to say that the valuation reports, be it from prosecution or defence, would not bind the court on the question as to whether the consideration was adequate; it was wrong to hold that whether RM3.5m was adequate consideration depended not on the market value but surrounding circumstances; whether the consideration was adequate, in the absence of a definition of 'market value', ought to be based on market value; and, the courts below had ignored the valuation of the government valuers. On the fourth issue as to whether SP2 was an accomplice, it was contended: the courts below failed to appreciate that SP2 was an accomplice and an interested witness, which was a misdirection; based on *Davies v Director of Public Prosecutions* [1954] 1 All ER 507, SP2 was an accomplice; SP2 had concurred in the commission of the offence; having regard to his participation in the offence and the surrounding circumstances, the evidence of SP2 should be treated with suspicion and could be so tainted as to require corroborative evidence; SP2 was an interested witness and therefore had motive to colour his testimony to serve his own purpose; *and, SP2, who gave evidence that was different from his statement to the MACC, perjured*. On the fifth issue that touched on the credibility of SP2 and SP3, it was submitted: it was mandatory on the part of the trial court to 'decide how the prosecution had established the charge'; the trial court 'failed in his judgment to be satisfied that each and every ingredient of the charge had been proved'; and, the Court of Appeal had not assessed the credibility of SP2 who was not a credible witness. On the sixth issue that pertained to the alleged failure to adequately consider the defence and or the sufficiency of proof of the charge, it was contended: the trial court failed to give proper weight and or consideration to the defence, failed to consider the credibility of witnesses and or the right of the appellant to the benefit of doubt; the defence was not a denial but a plausible explanation which the trial court failed to judicially appreciate; the trial court failed to consider the prosecution case in the light of the defence and contemporaneous documents; failed to determine whether the defence had cast a reasonable doubt; the conviction was unsafe, as total acceptance of the judgment of the trial court by Court of Appeal was in the face of failure by the trial court to give adequate consideration to the defence; the trial court had not scrutinised the evidence of SP2 in totality, in particular, the contradictions and motive; and, the Court of Appeal failed to appreciate that the prosecution wholly depended on the weak evidence of SP2 and or that a prima facie case had not been made out. And on the seventh and final issue with respect to forfeiture of the said land, it was contended: there was no provision for forfeiture under s 165 of the Code; the ACA 1997 violated arts 8 and 13 of the Federal Constitution; only at the 11th hour did the prosecution alert the

defence that the provision on forfeiture would be invoked; the application by the defence for time to prepare a submission on the issue of forfeiture was refused, which was a denial of the fundamental right of the appellant as enshrined in arts 8 and 13 of the Federal Constitution; the order of forfeiture was wrong; the true owner of the said land, whether it was the bank, appellant or wife, was not considered; whether the said land which was then charged could be automatically forfeited was an open question; and, whether there should be an inquiry before forfeiture should be answered.

[34] In response, the prosecution produced a written summary of its submission to address grounds of appeal D1–D5, D9, and D11–D15, which submission could be summarised as follows. On ground D1 as to whether the trial court and Court of Appeal erred in the finding that there was a prima facie case, it was submitted: the courts below had not erred; all ingredients of the offence had been proved; the appellant was a public servant; the purchase by the appellant of the said land from SP2 was for an inadequate consideration, which fact the appellant knew; and, the appellant knew that SP2 had dealings with him as a public servant. On ground D2 as to whether the Court of Appeal erred in holding that the appellant was a public servant, it was submitted: the appellant was the Menteri Besar on account of the testimony of the Secretary to the Selangor State Legislative Assembly ('SP6') who testified to that effect and also on account of the letter of appointment ('P35'); s 2 of the ACA 1997 defined 'pegawai badan awam' as 'mana-mana orang yang ... menjadi pengkhidmatan sesuatu badan awam'; in line with s 56 of the ACA 1997, s 165 of the Code was a prescribed offence; it was the testimony of SP17 that the appellant, as Chairman of PKNS, was a public servant; the PKNS Enactment provided that the Chief Minister shall automatically assumed the post of Chairman of PKNS; s 9(3) of the PKNS Enactment provided that all members of PKNS shall be deemed as public servants for the purposes of the Code; s 4(1) of the PKNS Enactment provided that the Board of PKNS shall consist of a Chairman who shall be the Menteri Besar; and, any error or omission in the charge to state that the appellant was Chairman of PKNS had not prejudiced the appellant or occasioned any miscarriage of justice. On grounds D3–D5 that related to the issue as to whether the consideration was adequate, it was submitted: the market value could not be measured but must be based on surrounding circumstances; the consideration of RM3.5m was inadequate; it was proved that the appellant was interested in the said land and knew that the asking price of SP1 was RM7m in 2004; the appellant asked SP2 to buy the said land in 2006; the appellant knew of the price paid by SP2 to SP1; the appellant appointed SP3 to renovate the said house when it was still registered in the name of SP2; the appellant purchased the said land at RM3.5m from SP2 in 2007 even though the appellant knew that SP2 had purchased the said land from SP1 at (RM6.5m); and, that the appellant was compelled to sell the said land to the appellant. On the issue as to whether the courts below had given too much weight to the valuation report ('P51') of SP8, and the valuation

report (P23) of SP10, as opposed to the valuation report ('D58') of SD5, it was argued that the courts below had not given too much weight to any report. On ground D9 that pertained to the issue as to whether SP2 was an accomplice, it was submitted: SP2 was not an accomplice; SP2 purchased the said land at the request of the appellant but in the hope that the appellant would buy it from him and pay the costs of renovation; SP2 was not agreeable to the appellant's offer of RM3.5m and counter proposed RM5m–RM5.5m; SP2 was forced to sell the said land to the appellant, as SP2 knew that the appellant was Chairman of PKNS with which he had business dealings; and, even if SP2 was an accomplice, he was corroborated by SP3. On ground D11 as to whether s 44 of the Anti-Corruption Act 1997 offended art 8 of the Federal Constitution, it was submitted: the said s 44 was constitutional; s 165 of the Code was a prescribed offence; and s 56 of the ACA 1997 provided that all provisions of the ACA 1997 applied. On ground D12, on the question of the credibility of SP3, it was argued; SP3 was a credible witness; the evidence of SP3 was supported by SP19 and P16; and, the trial court accepted the credibility of SP3 who was unshaken under cross-examination. On ground D13, on the question as to whether the trial court had evaluated the defence, it was submitted that the trial court had duly evaluated the defence and the valuation report of SD5. On ground D14, on the necessity of an enquiry before forfeiture of the said land, it was submitted that the requirements under s 36(1) of the ACA 1997 had been fulfilled. And on ground D15, as to whether the subject of forfeiture should be the difference between the value and the consideration paid, it was submitted that the whole of the subject matter should be forfeited.

[35] Both sides augmented their respective outline of issues or summary of submission with full written submissions that ran into 175 pages in the case of the appellant, and 51 pages in the case of the respondent. On top of that, the appellant had an additional 47 pages written submission on 'public servant' that revolved around the construction of ss 21 and 165 of the Code and ss 11, 12, 13 and 17 of the PKNS Enactment. Both sides rendered long oral submissions. But yet much was still amiss. Missing from oral and or written submissions was due regard for the ACA 1997, which, with respect, was wholly overlooked by the appellant and only partially explored by the respondent. Had regard been had for the ACA 1997, submissions would not have been that long or protracted but more focused.

[36] To be fair, the learned DPP did submit that s 165 of the Code was a prescribed offence and that the definition of 'officer of a public body' in s 2 of the ACA 1997 therefore applied. But with respect, it was not just s 2 of the ACA 1997 that applied. Section 56 of the ACA 1997 provided that all provisions of the ACA 1997 shall apply to a prescribed offence:

> Notwithstanding any other written law to the contrary, the provisions of this Act shall apply to a prescribed offence regardless of whether the prosecution or any other

proceedings in respect of such offence are instituted or taken by an officer of the Agency, or a police officer or customs officer, or any other officer having powers to investigate, prosecute or take any proceedings in respect of such offence.

[37] As for what was (ACA 1997 was replaced by the Malaysian Ant-Corruption Commission Act 2009 ('MACC Act 2009') which came into force on 1 January 2009) a prescribed offence, s 2 of the ACA 1997 thus provided that an offence punishable under s 165 of the Code was a prescribed offence:

'prescribed offence' means–

(a) an offence punishable under section 161, 162, 163, 164, 165, 213, 214 or 215 of the Penal Code;

...

Section 2 of the ACA 1997 also provided that an 'offence under this Act includes a prescribed offence'.

[38] When the alleged offence was committed in 2007, the ACA 1997 was in force. Hence, the alleged offence was a prescribed offence. Even under the MACC Act 2009, the alleged offence would still be a prescribed offence and the provisions of the MACC Act 2009 would still apply (see s 3 together with the Schedule and s 67 of the MACC Act 2009). All provisions of the ACA 1997 applied, which would be discussed later.

[39] For the moment, it is essential to lay out the ingredients of s 165 of the Code, which reads:

Section 165 of the Code

Whoever, being a public servant, accepts or obtains, or agrees to accept or attempts to obtain, for himself or for any other person, any valuable thing, without consideration, or for a consideration which he knows to be inadequate, from any person whom he knows to have been, or to be, or to be likely to be concerned in any proceeding or business transacted, or about to be transacted, by such public servant, or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from any person whom he knows to be interested in or related to the person so concerned, shall be punished with imprisonment for a term which may extend to two years or with fine or with both.

ILLUSTRATIONS

(a) A, a Judge, hires a house of Z, who has a case pending before him. It is agreed that A shall pay fifty ringgit a month, the house being such that, if the bargain were made in good faith, A would be required to pay two hundred ringgit a month. A has obtained a valuable thing from Z without adequate consideration.

(b) A, a Judge, buys of Z, who has a cause pending in A's Court, Government promissory notes at a discount, when they are selling in the market at a premium. A has obtained a valuable thing from Z without adequate consideration.

(c) Z's brother is apprehended and taken before A, a Magistrate, on a charge of perjury. A sells to Z shares in a bank at a premium, when they are selling in the market at a discount. Z pays A for the shares accordingly. The money so obtained by A is a valuable thing obtained by him without adequate consideration.

[40] In *Public Prosecutor v Ottavio Quattrocchi* [2003] 1 MLJ 225, which was affirmed by the Federal Court in *Public Prosecutor v Ottavio Quattrocchi* [2004] 3 MLJ 149, it was held by the High Court that the elements that require proof under s 165 of the Code are:

(a) that the accused was a public servant at the time of the commission of the offence;

(b) that he accepted or obtained or agreed to accept or attempted to obtain for himself or for someone else, a valuable thing;

(c) which he obtained from the person described in (b); and

(d) that he gave no consideration for it, or that the consideration given was known by him to be inadequate.

[41] With respect, the portion of the provision 'whom he knows to have been, or to be, or to be likely to be concerned in any proceeding or business transacted, or about to be transacted, by such public servant, or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from any person whom he knows to be interested in or related to the person so concerned', which goes to the mental state of an accused, is also required to be proved. That was stated in the following cases and textbooks.

[42] In *HHB Gill v The King-Emperor* 1947 48 Cr LJ 155, an appeal against conviction under s 165 of the Indian Penal Code ('the IPC') (which, until it was deleted, was identical to s 165 of the Code, except on the punishment), the Federal Court of India (which functioned until the Supreme Court of India was established in 1950) held that to establish an offence under s 161 of the IPC (which, until it was deleted, was identical to s 161 of the Code, save on the punishment), it is necessary to prove (1) that the giver and taker had entered an agreement in pursuance of which payment were to be made and were in fact made; (2) these payments were without lawful consideration; (3) that the taker received the payments knowing that the giver was concerned in business which the taker was transacting or about to transact in his capacity as a public servant;

and, (4) that the motive for the payment was that the taker should favour to the giver in transacting the business. The Federal Court of India further held that if the first three ingredients were proved but the motive was not, an offence under s 161 of the IPC could not be brought home but the accused would nevertheless be guilty of an offence under s 165 of the IPC (for further reading on the correlation between ss 161 and 165 of the Code, see *RG Jacob v Republic of India* AIR 1963 SC 550 at para 9; *Ratanlal & Dhirajlal's Law of Crimes* (26th Ed) at p 740; *Prevention of Corruption Act* by RB Sethi & RK Anand (2nd Ed) at p 244; *Basu's Indian Penal Code* (10th Ed) at p 711; and, *Halsbury's Laws of Malaysia* 2012 Reissue Vol 9(1) at para 230.149, note 9). In effect, the Federal Code of India held that knowledge, as stated in the section, of an accused is a common ingredient in both ss 161 and 165 of the IPC.

[43] The learned authors of *Dr Sir Hari Singh Gour's Penal Code of India* (11th Ed) and *Ratanlal & Dhirajlal's Law of Crimes* (26th Ed) concurred that proof of an offence under s 165 of the IPC includes proof of knowledge, as stated, of the accused.

[44] *Dr Sir Hari Singh Gour's Penal Code of India* (11th Ed) at p 1552:

> The points requiring proof are:
>
> (1) that the accused was a public servant at the time of the commission of the offence.
>
> (2) That he accepted or obtained or agreed to accept or attempted to obtain for himself or for someone else, a valuable thing.
>
> (3) Which he obtained, etc, from the person described in Cls (2) and (3).
>
> (4) That he gave no consideration for it, or that the consideration given was known to him to be inadequate.

[45] *Ratanlal & Dhirajlal's Law of Crimes* (26th Ed) at p 775:

> The prosecution must prove
>
> (i) that the accused is a public servant.
>
> (ii) that he has accepted or obtained, or has agreed to accept, or has attempted to obtain, for himself or for someone else, a valuable thing.
>
> (iii) that he gave no consideration for it, or gave a consideration which he knew to be inadequate. In a trial for an offence under this section where it is proved that the accused accepted for himself or any other person any valuable thing from any person, under section 4(i) of the Prevention of Corruption Act 1947, it shall be presumed, unless the contrary is proved, that he did so without consideration or for a consideration which he knew to be inadequate and it need not be proved that the acceptance of the valuable thing was a gratification other than legal remuneration before the above presumption can be drawn.

(iv) that the person from whom the accused accepted, etc, was known to the accused to have been, or to be, or to be likely to be, concerned in a proceeding or business transacted or about to be transacted by himself, or of a public servant to whom the accused was subordinate or from a person known to the accused to be interested in, or related to, the person so concerned.

[46] To update the above, the Prevention of Corruption Act 1947 of India ('the PC Act 1947') was repealed by the Prevention of Corruption Act 1988 of India ('the PC Act 1988') and 'Section 165 of the Indian Penal Code has been omitted from the Indian Penal Code altogether by the PC Act 1988 with effect from 9 September 1988, and the offence has been engrafted in the PC Act 1988, with modifications, as s 11' (A Treatise on the *Anti-Corruption Laws in India* by PV Ramakrishna (9th Ed) at p 593). The modification was an enhancement of the punishment.

[47] It should also be noted that the presumptions in the ACA 1997 and or MACC Act 2009 are differently worded from the equipollent presumptions in the PC Acts of 1947 and 1988 of India.

[48] Section 4(1) of the PC Act 1947 of India reads:

> Where in any trial of an offence punishable under section 161 or S.165 of the Indian Penal Code (45 of 1860) or of an offence referred to in clause (a) or clause (b) or sub-section (1) of Section 5 of this Act punishable under sub-section (2) thereof it is proved that an accused person has accepted or obtained, or has agreed to accept or attempted to obtain, for himself or for any other person, any gratification (other than legal remuneration) or any valuable thing from any person, it shall be presumed unless the contrary is proved that he accepted or obtained, or agreed to accept or attempted to obtain, that gratification or that valuable thing, as the case may be, as a motive or reward such as is mentioned in the said section 161, or, as the case may be, without consideration or for a consideration which he knows to be inadequate:

[49] Section 20(1) of the PC Act 1988 of India reads:

> Where, in any trial of an offence punishable under section 7 or section 11 or clause (a) or clause (b) of sub-section (1) of section 13 it is proved that an accused person has accepted or obtained or has agreed to accept or attempted to obtain for himself, or for any other person, any gratification (other than legal remuneration) or any valuable thing from any person, it shall be presumed, unless the contrary is proved, that he accepted or obtained or agreed to accept or attempted to obtain that gratification or that valuable thing, as the case may be, as a motive or reward such as is mentioned in section 7 or, as the case may be, without consideration or for a consideration which he knows to be Inadequate.

[50] Under both s 4(1) of the PC Act 1947 of India and s 20(1) of the PC Act

1988 of India, upon proof of receipt or attempt to obtain, the presumption shall be invoked.

[51] But under s 42(2) of the ACA 1997 and/or s 50(3) of the MACC Act 2009, mere proof of receipt or attempt to obtain is not enough for the invocation of the presumption.

[52] Both s 42(2) of the ACA 1997 and s 50(3) of the MACC Act identically provides:

> Where in any proceedings against any person for an offence under section 165 of the Penal Code it is proved that such person has accepted or attempted to obtain any valuable thing without consideration or for a consideration which such person knows to be inadequate, such person shall be presumed to have done so with such knowledge as to the circumstances as set out in the particulars of the offence, unless the contrary is proved.

[53] Thus, under s 42(2) of the ACA 1997, there must be proof that the taker accepted or attempted to obtain any valuable thing (i) without consideration, or (ii) for a consideration which the taker knows to be inadequate. Where it is proved that the taker accepted or attempted to obtain any valuable thing without consideration, the presumption shall be triggered (see *Baharuddin bin Ahmad v Public Prosecutor* [2010] 7 MLJ 577, where the defence admitted that the golf set was accepted without consideration and it was held by Zamani A Rahim JC, now JCA, that 'with that admission, the presumption under s 42(3) of the 1997 Act was activated ... it must be presumed that the accused had received the golf set without adequate consideration or in the words of the section 'it must also be presumed that it was done so with such knowledge as to the circumstances as set out in the particulars of the offence, unless the contrary is proved'). Alternatively, where it is proved that the taker accepted or attempted to obtain any valuable thing for a consideration which the taker knew to be inadequate, the presumption shall also be triggered.

[54] Three local authorities endorsed that the stated knowledge must be proved. In *Zaini bin Nyak Othman v Pendakwa Raya* [1999] MLJU 375, Nik Hashim J (later FCJ) held that an ingredient of the offence was that the accused knew that the giver had dealings that concerned his official duties. In *Baharuddin bin Ahmad v Public Prosecutor*, which was an appeal by the Yang DiPertua of Majlis Perbandaran Kangar against his conviction by the sessions court for offences which included one under s 165 of the Code, it was held by Zamani A Rahim JC that ingredient (c) was 'the accused gave no consideration for it, or gave a consideration which he knew to be inadequate', and that ingredient (d) was 'SP1 from whom the accused accepted, etc the valuable thing was known to the accused to have, or to be, or to be likely to be concerned

in a proceeding or business transacted or about to be transacted by himself, or which had a connection with the official function of himself, of a public servant to whom the accused was subordinate or from a person known to the accused to be interested in, or related to, the person so connected'. And in *Abu Bakar bin Seblie v Public Prosecutor* [2012] 2 MLJ 842, it was held by Ravinthran Paramaguru JC, now J, that one of the ingredients of the offence under s 165 of the Code was 'that PW17 of Labyrinth Networks Sdn Bhd from whom the appellant had accepted the said gifts was known to the appellant to have had dealings or connection with the official function of his department'.

[55] Therefore, the ingredients of an offence under s 165 of the Code are the following:

(a) the accused, being a public servant;

(b) accepts or obtains, or agrees to accept or attempts to obtain, for himself or for any other person, any valuable thing;

(c) without consideration, or for a consideration which he knows to be inadequate; and

(d) from any person whom he knows to have been, or to be, or to be likely to be concerned in any proceeding or business transacted, or about to be transacted, by such public servant, or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from any person whom he knows to be interested in or related to the person so concerned.

[56] It is now opportune to address the (written) submission that the charge was defective by reason that it stated that the appellant was a public servant, to wit, Chief Minister, whereas the alleged facts had to do with the appellant as Chairman of PKNS. It was argued that the alleged defect in the charge went to a fundamental principle of administration of justice, which was not a mere irregularity but an illegality. *Yap Sing Hock & Anor v Public Prosecutor* [1992] 2 MLJ 714, *R v Saunders* [1990] 1 SCR 1020 and *Chin Choy v Public Prosecutor* [1955] 1 MLJ 236 were cited by learned counsel. It was contended that 'The appellant was fundamentally misled and prejudiced because, the charge stat(ed) his capacity as Menteri Besar, the appellant did not mount a challenge that when he did not do so in his capacity as Chairman of PKNS but only in his capacity as the Menteri Besar. The witness who testified to the above letters (P) could have been cross-examined to show that whe(n) the appellant agreed to certain applications on behalf of SP2, he did so in his capacity as Menteri Besar and not Chairman of PKNS. If the court had amended the charge at trial, the appellant no doubt would have avail(ed) himself of s 162 of the CPC and recalled, re-examine(d) and produced evidence tending to show the exact capacity he was in when he did the acts which formed the evidence

that impressed the (Court of Appeal). This he was denied' (see submission of 'Public Servant' Part C para 29).

[57] The form in which criminal charges are to be framed is governed by ss 152–154 of the Criminal Procedure Code ('the CPC'). Recently, in *Ravindran a/l Ramasamy v Public Prosecutor* [2015] 3 CLJ 421, the Federal Court reflected on ss 152–154, 156, 163 and 422 of the CPC. In relation to ss 152–154, the Federal Court said:

> Section 152 of the CPC provides that the charge shall 'state the offence with which the accused is charged' and mention 'the law and section of the law against which the offence is said to have been committed'. Section 153 of the CPC provides that 'the charge shall contain such particulars as to the time and place of the alleged offence ... as are reasonably sufficient to give the accused notice of the matter with which he is charged'. And when the nature of the case is such that the particulars mentioned in ss 152 and 153 do not give the accused sufficient notice of the matter with which he is charged, s 154 of the CPC provides that 'the charge shall also contain such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose.

[58] Where a charge is found wanting, it can be cured by ss 156 and or 422 of the Criminal Procedure Code ('the CPC'), which read:

> Section 156 of the CPC
>
> No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars shall be regarded, at any stage of the case, as material unless the accused was in fact misled by that error or omission.
>
> Section 422 of the CPC:
>
> Subject to the provisions contained in this Chapter no finding, sentence or order passed or made by a Court of competent jurisdiction shall be reversed or altered on account of–
>
> (a) any error, omission or irregularity in the complaint, sanction, consent, summons, warrant, charge, judgment or other proceedings before or during trial or in any inquiry or other proceeding under this Code;
>
> (b) the want of any sanction; or
>
> (c) the improper admission or rejection of any evidence,
>
> unless such error, omission, irregularity, want, or improper admission or rejection of evidence has occasioned a failure of justice.

[59] In relation to ss 156 and 422 of the CPC, the Federal Court in *Ravindran a/l Ramasamy* said:

> Pursuant to s 156 of the CPC, 'no error in stating the offence or the particulars required to be stated in the charge, and no omission to state the offence or those

particulars shall be regarded, at any stage of the case, as material unless the accused was in fact misled by that error or omission' (the Indian equivalent, s 215 of the Indian Criminal Procedure Code, ends with the words 'and it has occasioned a failure of justice'). However, in view of s 422, for an error or omission to be material, it is not enough that the accused has been misled; there must also be a failure of justice. 'Whether any court should apply s 422 aforesaid will depend, among other things, on whether the irregularity involves the breach of a principle of general importance to the administration of criminal justice. If it does, the court would not apply s 422, as this appears to us to be the same thing as the irregularity having occasioned a failure of justice (*Yap Sing Hock & anor v Public Prosecutor* [1992] 2 MLJ 714 at p 725 per Peh Swee Chin SCJ, later FCJ, delivering the judgment of the court).

[60] Pertinently, in the following paragraph, the Federal Court in *Ravindran a/l Ramasamy* drew a distinction between an error or omission in the ingredients of an offence, as opposed to an error or omission in the particulars of the offence.

It could also be noted that the 'error' alluded to in s 156 of the CPC is the error in stating the offence or the particulars required to be stated in the charge, and not the error in stating the ingredients of an offence. That important distinction, whether an error in stating the particulars or an error in stating the ingredients, must be drawn for the purposes of ss 156 and or 422 of the CPC. This is because where it was an error or omission in stating the ingredients of an offence, it had been consistently held by the courts that the accused would have been misled and that there must have been a failure of justice. *Low Seng Wah v Public Prosecutor* [1962] 1 MLJ 107, was the exceptional case, where Neal J held that the omission of an essential ingredient in the charge was not fatal, because of the unique provisions of s 321 of the CPC (since repealed) which provided that 'No judgment, sentence or order of magistrate court shall be reversed or set aside unless it is shown to the satisfaction of the court of a judge that such judgment, sentence or order was either wrong in law or against the weight of the evidence'. *Low Seng Wah v Public Prosecutor*, which was primarily decided under s 321, is no precedent on s 156 of the CPC.

But in cases decided primarily under ss 156 and or 422 of the CPC, courts had refused to invoke those provisions where it was an error or omission in stating the ingredients of an offence.

[61] Hence, unless it is an error or omission in the ingredients, an error or omission in the particulars of the offence is curable, which begs the question, was there any error or omission in the ingredients or particulars of the instant offence? The charge stated that the appellant was a public servant, to wit, Chief Minister, whereas the evidence alleged that it had to do with the appellant as Chairman of PKNS. But it could only appear that all ingredients of the offence were stated in the charge, in the following portions, with emphasis added, of the said charge.

Bahawa kamu pada 29 Mei 2007 di kediaman rasmi Menteri Besar Selangor, Jalan Permata 7/1, Seksyen 7, Shah Alam, di dalam Negeri Selangor Darul Ehsan, *sebagai*

penjawat awam iaitu Menteri Besar Kerajaan Negeri Selangor Darul Ehsan, *telah mendapat untuk diri kamu dan isteri kamu*, Zahrah bt Kechik (650216–08–5432), *suatu barang yang berharga dengan suatu balasan yang kamu ketahui tidak mencukupi* iaitu lot tanah dan sebuah rumah yang terletak di alamat No. 8 & 10, Jalan Suasa 7/11, Shah Alam, Selangor Darul Ehsan, daripada Ditamas Sdn Bhd *melalui Shamsudin Bin Hayroni, Pengarah Ditamas Sdn Bhd*, dengan harga RM3.5 juta sedangkan hartanah tersebut telah dibeli oleh Ditamas Sdn Bhd pada Disember 2004 dengan harga RM6.5 juta, *yang mana kamu mengetahui bahawa Shamsudin Bin Hayroni mempunyai hubungan dengan kerja-kerja rasmi kamu* dan oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 165 Kanun Keseksaan. (Emphasis added.)

[62] The instant charge clearly stated (i) that the appellant as a public servant (ii) accepted a valuable thing for himself and his wife (iii) for a consideration which he knew to be inadequate (iv) from SP2 whom he knew had connections with his official work. It was plain as a pikestaff that all required ingredients of the offence were stated. There was no error or omission in the ingredients of the charge. If at all, it would only be an error or omission in the particulars of the offence. The particulars of the offence were those portions of the charge without emphasis.

[63] But was there an error or omission in the particulars of the offence? The charge read that the appellant being a public servant, to wit, Chief Minister, accepted ... from SP2 whom he knew had connections with his official work. Those words in the charge alleged that the appellant knew that SP2 had connections with his official work as Chief Minister. But the evidence alleged that the appellant knew that SP2 had connections with his official work as Chairman of PKNS, which gave rise to the argument that the appellant was thereby misled. But was not the official work of the Chairman of PKNS an integral part of the official work of the Chief Minister? Section 4(1) of the PKNS Enactment provided that the Chief Minister shall be Chairman of PKNS. Therefore, as Chief Minister, the appellant was also Chairman of PKNS, such that the official work of the appellant as Chief Minister encompassed, besides whatever else by reason of the Chief Ministership, the official work of Chairman of PKNS. In other words, the official work of the appellant as Chairman of PKNS was an integral part of the official work of the appellant as Chief Minister, such that it could not be argued that the official work of the Chairman of PKNS was not the official work of the appellant as Chief Minister. Given that the work of Chairman of PKNS was an integral part of the official work of the Chief Minister, being entrusted by law to the Chief Minister, it was not an error in the particulars of the offence to state that the appellant knew that SP2 had connections with his official work as Chief Minister.

[64] In any case, it would not seem that the appellant could have been misled. Admittedly, the charge did not state that the connection was with the official work of the appellant as Chairman of PKNS. Perhaps, when he was initially charged, as per the charge, the appellant had to second guess which official work, amongst his many portfolios, that the charge referred to. But when the trial was still at an early stage, at the point when SP2 testified in examination-in-chief that his companies had projects and a joint venture with PKNS, it would have dawned upon all that the case of the prosecution was that the alleged connection of SP2 with the official work of the appellant was in relation to the official work of the appellant as Chairman of PKNS. That was the connection that the prosecution alleged that the appellant knew. One component of the ingredients of the offence was the appellant knew that SP2 had the aforesaid connection with his official work. And in relation to the appellant's knowledge of SP2's connection with his official work, it had to do with the appellant's knowledge of the said connection. Whether the appellant had or had not approved the applications of the companies of SP2, or whether the appellant had done so as Chief Minister or Chairman of PKNS, was not the issue. The argument – that when the appellant approved the applications of the companies of SP2, he did so as Chief Minister and not as Chairman of PKNS – failed to appreciate that the issue pertained to the appellant's knowledge of the alleged connection. The argument that the appellant could have called or recalled witnesses to challenge the prosecution story that he as Chairman of PKNS had approved the applications of the companies of SP2, had missed the point. Any evidence that the appellant had or had not signed as Chief Minister or Chairman of PKNS had no relevance to the issue of knowledge of the alleged connection. For even if the appellant had as Chief Minister approved the applications of the companies of SP2, it would still not impact on the ingredient of knowledge of the alleged connection.

[65] There was no error or omission in the ingredients and or particulars of the offence. There was no defect in the charge. In any case, it was not shown that the appellant was materially misled. It was also not shown that a miscarriage of justice had been occasioned, for it was open to the appellant, but which the appellant wholly eschewed, to cross-examine SP2 and or to call his witnesses, including himself, to testify on the approvals given to the companies of SP2. The challenge to the charge must therefore fail.

[66] The submission that SP2 was an accomplice, that SP2 must be corroborated, and so forth and so forth, must also fail. As said, s 165 of the Code was a prescribed offence and the provisions of the ACA 1997 wholly applied. Section 44 of the ACA 1997 read:

> (1) Notwithstanding any written law or rule of law to the contrary, in any proceedings against any person for an offence under this Act–

(a) no witness shall be regarded as an accomplice by reason only of such witness having–

(i) accepted, received, obtained, solicited, agreed to accept or receive, or attempted to obtain any gratification from any person;

(ii) given, promised, offered or agreed to give any gratification; or

(iii) been in any manner concerned in the commission of such offence or having knowledge of the commission of the offence;

(b) no agent provocateur, whether he is an officer of the Agency or not, shall be presumed to be unworthy of credit by reason only of his having attempted to commit, or to abet, having abetted or having been engaged in a criminal conspiracy to commit, such offence if the main purpose of such attempt, abetment or engagement was to secure evidence against such person; and

(c) any statement, whether oral or written, made to an agent provocateur by such person shall be admissible as evidence at his trial.

(2) Notwithstanding any written law or rule of law to the contrary, a conviction for any offence under this Act solely on the uncorroborated evidence of any accomplice or agent provocateur shall not be illegal and no such conviction shall be set aside merely because the court which tried the case has failed to refer in the grounds of its judgment to the need to warn itself against the danger of convicting on such evidence.

[67] Pursuant to s 44(1)(a)(ii) of the ACA 1997, no giver could be 'regarded as an accomplice'. Pursuant to s 44(2) of the ACA 1997, a conviction on the uncorroborated evidence of any accomplice 'shall not be set aside merely because the court which tried the case has failed to refer in the grounds of its judgment to the need to warn itself against the danger of convicting on such evidence'. Therefore, it could not be heard to say that SP2 was an accomplice and or that his evidence must be corroborated.

[68] We can now evaluate the proof of the ingredients of the alleged offence, the defence, and address the other issues raised in submission.

[69] The first ingredient of the offence was that the appellant was a public servant, to wit, Chief Minister. That the appellant was the Chief Minister of the State of Selangor at the material time, which must be a fact in the public domain, was not in dispute. In dispute however was whether the appellant was a public servant.

[70] The charge alleged that the appellant, as Chief Minister, was a public servant. Learned counsel for the appellant argued that the appellant as Chairman of PKNS was not a public servant within the definition of s 21(i) of the Code.

[71] On the construction of the phrase 'as such officer' in s 21(i) of the Code, Kamarul Hisham Kamaruddin, learned co-counsel for the appellant submitted: 'as such officer' meant that 'such officer' had the duty to carry out the matters in s 21(i); the functions of PKNS were performed by PKNS; the appellant as Chairman of PKNS could not perform the matters in s 21(i) and therefore the appellant could not fall within the s 21(i) definition of 'public servant'; unless PKNS had delegated its powers and functions to the appellant, the matters in s 21(i) were performed by PKNS; the appellant as Chairman of PKNS was vested with powers to call meetings and keep minutes of meetings; those were the only duties of the appellant as Chairman of PKNS; the appellant was only 'such officer' for the calling of meetings and the keeping of minutes; the appellant had nothing to do with the powers and functions of PKNS; the duties enumerated in s 21(i) must be the duties of the appellant as Chairman of PKNS; the Court of Appeal was wrong to hold that the powers of PKNS under s 12 of the PKNS Enactment is similar to the matters in s 21(i) and that therefore the appellant who possessed the powers under s 12 of the PKNS Enactment had the duty under s 21(i); only the powers under s 12 of the PKNS Enactment bore semblance to s 21(i); as Chairman, the appellant was a member and not officer or servant of PKNS (counsel cited s 9(1) of the PKNS Enactment); and, in any case, s 21(i) could not apply, as the acts enumerated in s 21(i) must be 'on behalf of the Government', whereas PKNS performed its functions or duties 'on its own behalf as a corporate body.

[72] Learned counsel also thus argued that the appellant, as Chief Minister, was not a public servant within the meaning of s 165 of the Code: to fall within s 21(i), it must be shown that Chief Minister is an 'officer' of the Government and that he is paid 'for the performance of any public duty'; in *M Karunanidhi v Union of India* AIR 1979 SC 898, the Supreme Court of India considered the duties of Chief Ministers under article 167 of the Indian Constitution and concluded that Chief Ministers or the Ministers are entitled to salaries or allowances in lieu of public duties that they performed; there is no provision in the Federal Constitution on the duties of Chief Ministers; the Chief Minister is not an 'officer' of the Government; the appellant was a member of the administration; a 'member' bears a different meaning from 'officer'; s 3 of the MACC Act 2009 defines a 'public body' to include the government of a state, a Chief Minister as a member of the administration, and an 'officer of a public body' to include a member of the administration; but there is no definition of 'officer' of a government in the Code; public servant in the government is not analogous to 'officer of a public body'; the definitions of 'public servant' and 'officer of a public body' do not include a 'member of the administration'; and, therefore 'the general words of 'every officer in the ... pay of the government or remunerated by fees of commission for the performance of any public duty' is confined to the meaning ... which clearly do not include 'member of the administration' ;the words in the last portion of s 21(i) must be read in the context of s 21(i) as a whole; and, s 21(i) is materially different from s 21 cl (9)

of the Indian Penal Code, as the last words of that clause were severed from the clause and constituted as a new cl (12).

[73] Earlier, Mohd Shafee bin Abdullah, learned lead counsel for the appellant orally submitted: the appellant, as Chief Minister, could not be a public servant; a public servant must come within s 21 of the Code; the appellant had no powers to carry out the matters in s 21(i); 's 9(3) of the PKNS Enactment is the opposite of s 21(i) of the Code'; a state enactment such as the PKNS Enactment could not change the Code, which is Federal law; the court could not use the State Enactment to strike out s 21(i); the duties of Chairman of PKNS fell outside s 21(i); and, in *Public Prosecutor v Phee Joo Teik* [1962] 1 MLJ 56, the State Enactment was (wrongly) read as Federal law.

[74] On 'public servant', Masri bin Mohd Daud, the learned deputy public prosecutor replied: on 24 August 2000, the appellant was appointed as the Chief Minister and continued to be so until March 2008; pursuant to s 2 of the ACA 1997, an officer of a public body is any person in the service of a public body; as Chief Minister, the appellant was in the service of and paid by the Government of Selangor, which made him a public servant; as Chief Minister, the appellant was automatically Chairman of PKNS; s 9(3) of the PKNS Enactment provided that all members, officers and staff of PKNS shall be deemed as public servants for the purposes of the Code; the meaning of members in s 2 of the PKNS Enactment meant any member under s 4(i) of the PKNS Enactment which included the Chairman of PKNS (learned DPP cited *Public Prosecutor v Phee Joo Teik* at p 60); and, therefore, the appellant, as Chief Minister and also Chairman of PKNS was a public servant under s 165 of the Code (learned DPP cited *Public Prosecutor v Datuk Haji Harun bin Haji Idris* [1977] 1 MLJ 15 at p 20).

[75] Of the diverse provisions cited by learned counsel and learned DPP on 'public servant', the foremost provision for consideration should be that under the Code. Section 21(i) of the Code provides:

> The words 'public servant' denote a person falling under any of the descriptions hereinafter following:
>
> ...
>
> (i) every officer whose duty it is, as such officer, to take, receive, keep or expend any property, on behalf of Government, or to make any survey, assessment, or contract on behalf of Government, or to execute any revenue process, or to investigate, or to report on any matter affecting the pecuniary interests of Government, or to make, authenticate, or keep any document relating to the pecuniary interests of Government, or to prevent the infraction of any law for the protection of the pecuniary interests of Government, *and every officer in the service or pay of Government, or remunerated by fees or commission for the performance of any public duty*;

...

Explanation 1 – Persons falling under any of the above descriptions are public servants, whether appointed by the Government or not.

Explanation 2 – Whether the words 'public servant' occur, they shall be understood of every person who is in actual possession of the situation of a public servant, whatever legal defect there may be in his right to hold that situation. (Emphasis added)

[76] There is no definition of 'officer' in the Code. But s 21(i) of the Code provides that 'the words 'public servant' denotes ... *every officer in the service or pay of Government, or remunerated by fees or commission for the performance of any public duty*' (Emphasis added). Accordingly, every officer in the service or pay of Government, which 'includes the Government of Malaysia and of the States and any person lawfully performing executive functions of Government under any written law' (see s 17 of the Code) or remunerated by fees or commission for the performance of any public duty is a public servant (*Lim Kee Butt v Public Prosecutor* [1954] 1 MLJ 35, per Matthew CJ, delivering the judgment of the court, who cited *Nazamuddin v Queen-Empress* (1901) ILR 28 Cal 344).

[77] 'The test to determine whether a person is a public servant is (1) in the service or pay of the Government and (2) whether he is entrusted with the performance of an public duty' (*Ratanlal & Dhirajlal, The Indian Penal Code* (34th Ed) at p 29). As Chief Minister, the appellant was the presiding member of the State Executive Council (art 53(2) of the Constitution of the State of Selangor). The appellant was also a member of the State Legislative Assembly (art 63 of the Constitution of the State of Selangor). Pursuant to art 53(9) of the Constitution of the State of Selangor, the Legislature provided for remuneration to members of the State Executive Council. Pursuant to art 74 of the Constitution of the State of Selangor, the Legislature provided for remuneration to members of the Legislature. As Chief Minister and member of the State Legislature, the appellant was clearly in the pay of Government. As head of the State Executive Council which exercised the executive authority of the State (art 50 of the Constitution of the State of Selangor), the appellant was in the service of Government. And as Chief Minster, the appellant was paid by Government and entrusted with the performance of a public duty, which meant that he was an 'officer' under s 21(i) of the Code (*G A Monterio v State of Ajmer* AIR 1957 SC 13 at p 15, which was followed in *The State Of Ajmer (Now Rajasthan) v Shivji Lal* 1959 SCR Supl (2) 739; *The State Of Gujarat v Manshankar Prabhasankar Dwivedi* AIR 1973 330 at p 333). Even on one factor alone, namely appointment to the office for the performance of a public duty, the appellant was a 'public servant' (*Queen-Empress v Parmeshar Dat* (1886) ILR 8 All 201 at p 202; *The Queen v Ramkrishna Das & ors* 1871 Bengal Law Reports (Vol VII) 446 at p 448) and an 'officer' (*Ismail Mohamed*

Hajee and other v The King (28) AIR 1941 Rangoon 349 at 350; *Emperor v Karam Chand Gobind Ram* 1944 45 Cr LJ 64 at p 65). For pursuant to explanation 2 s 21 IPC, which is identical to explanation 2 of s 21 of the Code, anyone in actual possession of the situation of a public servant is a public servant, notwithstanding any defect in the appointment (*Bajrang Lal & anor v State Of Rajasthan* 1976 Cri LJ 727 at p 730; *Brijbehari v Emperor (28)* AIR 1941 Patna 539 at p 542).

[78] Whichever, as Chief Minister or 'officer' or as one in the pay or service of Government, the appellant was a 'public servant' within the meaning of the Code.

[79] It was argued that the words 'every officer in the service or pay of Government, or remunerated by fees or commission for the performance of any public duty' in the last sentence of s 21(i) of the Code was disserted from s 21 cl (9) of the IPC and re-enacted as a new clause (12) with the words 'every person' instead of 'every officer'. The trust of that argument was that there is a difference between s 21(i) of the Code and s 21 of the IPC. There was no elaboration from learned counsel as to how that difference impacted on the construction of s 21(i) of the Code (see submission on 'Public Servant' Part B para 3).

[80] In *RS Nayak v AR Antulay* AIR 1984 SC 684, the Supreme Court of India imparted the following narrative on the historical evolution of s 21(i) of the IPC. Prior to 1964, s 21 cl (9) of the IPC was identical to s 21(i) of the Code. Pursuant to amending Act 40 of 1964, the words 'every officer in the service or pay of Government, or remunerated by fees or commission for the performance of any public duty' were severed from cl (9) and re-enacted as a new cl (12)(a). However, the words 'every officer' were amended to read as 'every person' in the new cl (12)(a).

[81] On the effect of those amendments, the Supreme Court of India in *RS Nayak v AR Antulay* said, at para 43:

> ... the amendment of clauses (9) and (12) did not bring about any change in the coverage and construction of those 2 clauses prior to and since their amendment.

[82] Since s 21(i) of the Code was identical to the pre-amendment s 21 cl (9) of the IPC, it should be preferable to first appreciate the coverage and construction of the pre-amended s 21 cl (9) IPC. In *Rao Shiv Bahadur Singh and another v The State Of Vindhya Pradesh* AIR 1953 394, the appellants were respectively the Minister for Industries and the Secretary to the Government, Commerce and Industries Department of the then United State of Vindhya Pradesh. The appellants were charged for criminal conspiracy and for taking of illegal gratification by a public servant for doing an official act, and for the

commission of forgery in connection therewith. One charge was under s 161 of the IPC. Ordinance 48 of 1949 had amended the IPC by substituting for the previous first clause of s 21 of the IPC with the phrase 'every Minister of State'. As to whether a Minister of State was a public servant before Ordinance 48 of 1949, that is, when the phrase 'every Minister of State' was not there, the Supreme Court of India in *Rao Shiv Bahadur Singh and another v The State Of Vindhya Pradesh* said:

> But it does not follow that a 'Minister of State' was not a public servant as defined in section 21, Indian Penal Code, even before this amendment. Clause 9 of S 21 IPC shows that every officer in the service or pay of the Crown for the performance of any public duty is a 'public servant'. The decision of the Privy Council in *Emperor v Sibnath Banerji* AIR 1945 PC 156 at pp 162 and 163 is decisive to show that a Minister under the Government of India is an officer subordinate to the Governor. On the same reasoning there can be no doubt that the Minister of Vindhya Pradesh would be an 'officer' of the State of Vindhya Pradesh.

[83] In effect, in those two decisions, the Supreme Court of India held that a Minister of State is a 'public servant' as defined in the pre-amendment s 21 cl (9) of the IPC, and that amending Act 40 of 1964 had not brought any changes thereto. The submission that there was a material difference between the pre and post amendment s 21 of the IPC, because of a separate cl (12) with the phrase 'every person' instead of 'every officer', was entirely against authority and had no merit whatsoever.

[84] The interpretation of the Supreme Court of India was that the pre-amendment s 21 cl 9 of the IPC covered a Minister of State. Whoever in the pay or service of Government or remunerated by fees or commission for the performance of any public duty is a 'public servant'. A Minister who is both in the pay and service of Government, is clearly a 'public servant'. That was stated by the Supreme Court of India in *Dattatraya Narayan Patil v The State of Maharashtra* AIR 1975 SC 1685 at p 1688, *M Karunanidhi v Union of India* AIR 1979 898, at p 913, and *R Balakrishna Pillai v State Of Kerala & Anr* AIR 1996 SC 901 at p 920, and by the High Court in *Ramditta Mal L Duni Chand v Emperor* AIR 1939 (Nagpur) 38 at 39, *Bakshi Ghulam Mohd v GM Sadiq* AIR 1968 Jammu & Kashmir 98 at p 102, *Nar Bahadur Bhandari etc v State Of Sikkim And Others* 1998 Cr LJ 3413at p 3417, and *Rajendra Kumar Singh and etc v State Of Madhya Pradesh and Ors* 1999 Cri LJ 2807 at p 2819.

[85] A peon of the Collector's Court who received no fixed pay but was remunerated by fees was a 'public servant' (*The Queen v Ramkrishna Das & anor*). A clerk in a Government Collectorate was a 'public servant' (*Jugal Singh v Emperor* AIR 1943 Pat 315). A Chief Minister is not? A Chief Minister is a 'public servant', if there is any need for a reminder. The appellant remained a

'public servant' even while he wore the hat of Chairman of PKNS, for the appellant ceased not to be a 'public servant' just because he wore a different hat or hats. The first ingredient of 'public servant' was proved.

[86] Since the first ingredient was proved without any resort to the PKNS Enactment, there is no need to deal with the point that the definition of 'public servant' in a state enactment (PKNS Enactment) could not be injected into the Code which is Federal law.

[87] As for the second ingredient 'accepted a valuable thing for himself and his wife', that was proved, beyond all doubt, by the registration of the transfer of the said land (P33 and P34), which was a most valuable thing, from SP2 to the appellant and wife.

[88] The third ingredient 'for a consideration which he knew to be inadequate' required proof (i) that the consideration was inadequate, and, (ii) that the appellant knew that the consideration was inadequate.

[89] It was evidence elicited by the defence from SP1 whom learned counsel said had no reason to lie (see appellant's written submission ('AS') at para 217), that SP1 puchased Lot 8 in 1995 for RM763,000 and the adjoining Lot 10 in 1996 for RM572,000, that SP1 commenced construction of the house on Lot 8 in 1997 which he completed in 1998/1999 at a cost of RM2.5m–RM3m, and that the sale between SP1 and SP2 was on a willing seller and willing buyer basis. It was the unchallenged evidence of SP1 that Dato' Sumadi whom SP1 had asked to find a buyer, brought the appellant and wife as potential buyers of the said land to meet SP1, that the appellant asked SP1 for the sale price and SP1 answered 'RM7m', and that the appellant then remarked that it was too expensive. It was the evidence of SP2 that he asked for RM5m–RM5.5m and that he did not agree to accept RM3.5m from the appellant.

[90] The following findings and or conclusions could be made and or drawn from the latter prosecution evidence. SP1 expended about RM3.8m–RM4.3m to purchase the said land and erect the house. That total expenditure was an indicator of the approximate value of the said land in 1998. In 2004, the appellant and wife were potential buyers of the said land. Hence, the appellant had an interest in the said land since 2004. In 2004, the appellant knew that the sale price was RM7m. Even if on the high side, RM7m was the opening price, which was an indicator of the potential market price or market value. In 2004, SP1 sold the said land to SP2 on a willing seller and willing buyer basis. Three years later, in 2007, SP2 asked for RM5m–RM5.5m, a substantial drop of RM1.5m–RM2m or 21%–28% off the asking price in 2004. In real estate, that must be too good to be true. That offer of SP2 to the appellant was plainly a bargain. The appellant knew the asking price in 2004 and the offer in 2007.

That should inform the appellant that he had a bargain for the taking. Yet the appellant insisted on sale based on valuation. Reasonably, in a usual sale on a willing seller and willing buyer basis, that would not happen. If the price could not be agreed, the sale would usually be called off. In a normal case, where consideration could not be agreed, no buyer would have the audacity to insist on consideration based on valuation, or even if he had would get away with it. But the appellant had his way. Sale to the appellant was based a valuation that exactly matched the exact sum offered by the appellant to SP2 which SP2 had not accepted. The said land was sold to the appellant at RM3.5m in 2007 when it was in the knowledge of the appellant that SP1 had asked for RM7m in 2004. The appellant should know that his consideration in 2007 was half the asking price in 2004.

[91] Fairly said, it would only appear that sale to the appellant and wife could not have been on a willing seller and willing buyer basis, which supported the story of SP2 that he had no option but to sell, out of fear that his business with PKNS, where the appellant was Chairman, would otherwise be adversely affected, which story of SP2 was supported by SP7 of the Valuation Department who testified that she asked SP2 for the reason for the sale below market price to which SP2 answered 'ada masalah dan terpaksa jual' (see p 95 of the appeal record). Indeed, why would SP2 sell at RM3.5m when he had bought it at RM6.5m? There was no evidence that SP2 was in financial straits. It would not seem that SP2 could have been a willing seller.

[92] Knowledge of the appellant could only be inferred. On the facts, the appellant should know that the consideration was inadequate. Perhaps, the appellant might not know the exact shortfall. But nonetheless, the appellant should know that the consideration was inadequate.

[93] That the consideration was inadequate was supported by other prosecution evidence. It was the unchallenged valuation of SP9 of the Valuation Department, Shah Alam, that the value of the land and original house was RM4,807,948 (see pp 152–154 of the appeal record). It was the valuation of Long Tian Chek ('SP8'), a professional valuer of Messrs Henry Butcher Malaysia who was appointed by the MACC, that the value of land and incomplete building was RM5.55m in 2007. It was the valuation of Nor Sidek bin Mohd Nor ('SP10'), a professional valuer and retired government valuer who was appointed by SP2, that the value of land and incomplete building was RM5.52m in 2007. It was the unchallenged testimony of SP10 that the forced sale value of the said land and building, in the condition in June 2007, was RM4.46m, while the value of land and complete building was RM7.5m.

[94] The above was direct evidence that the consideration was inadequate. Given so, it would seem that not only could it be inferred that the

consideration was inadequate, but it could be held on direct evidence that the consideration was inadequate. Prima facie, on the evidence, a reasonable tribunal should find that the third ingredient – 'the appellant knew that the consideration was inadequate' – was proved.

[95] However, it was argued that the trial court had not assessed the credibility of SP2 and or SP3. That however could not be true, as the credibility of SP and SP3 was assessed by the trial court at the end of the prosecution case and or at the end of the entire case (see aforesaid summary of the findings of the trial judge). Be that as it may, it was argued: SP2 gave inconsistent statements to the MACC; SP2 was a co-accused who testified for the prosecution after the charge against him was withdrawn; there was motive on the part of SP2 to lie to avoid prosecution; there would have been a propensity on the part of SP2 to implicate the appellant; and, SP2 was an unreliable witness and whose evidence should be taken with a pinch of salt. Learned Counsel also pointed to the following 'discrepancies' in the testimony of SP2: (i) under EIC, he said he went to the said land with Dato' Sumadi and appellant, but when recalled, he said he went with Dato' Sumadi but the appellant was not with them; (ii) he said that during his first visit to the said land, he was told that the appellant had visited the said land and was interested in it, but he also said that the meeting to discuss the purchase was before his visit to the said land, which contradicted his story on his first knowledge of the appellant's interest in the said land. It was further argued: SP2 visited the said land in 2004 because he had a personal interest in the said land; the interest of SP2 became more fervent 'when he realized that the appellant was interested in the said land which was the perfect opportunity to buy the house and curry favour' (see AS at para 218); the testimony on the meeting to purchase was 'to drag the appellant into the picture' (see AS at para 221); the circumstantial evidence showed that the appellant was not interested in the said land, and after his first visit, 'the appellant completely disappeared from the equation' (see AS at para 230); everything hung upon the question as to whether the transaction in 2004 was upon the instruction of the appellant (see AS para 234); what was said to have been said by Dato' Sumadi was hearsay; only Dato' Sumadi could testify as to whether the appellant was still interested after the first visit; the appellant was not interested after the first visit; it was unlikely that the appellant could have asked both Dato' Sumadi and SP2 to buy the said land; if at all, any request to buy was 'no more than in jest or simply social banter' (see AS para 241); SP2 was desperate to make something out of nothing; and, SP2 was an interested witness with a purpose of his own to serve.

[96] It should be pointed out that the statements of SP2 to the MACC were never tendered in evidence. The only evidence of the 'inconsistent' statements of SP2 came from SP2 himself, during examination-in-chief, where he said:

Statement pada 2009, saya tak nyata jual bawah market dan nyatakan saya tiada

option. *Statement* 2009 saya nyatakan bahawa saya yang lantik sebagai betul kecuali OKT. Saya jual bukan nak kurungkan *profit loss*.

Rakaman percakapan selepas dibuat selepas pertuduhan ditarik balik adalah sama dengan kenyataan saya di mahkamah.

[97] The explanation of SP2 was as follows:

Setelah saya di panggil pada 2009 untuk buat *statement* dari SPRM, di situ saya banyak desakan dari OKT, saya diarah bercakap untuk tidak melibatkan dia. Dia selalu janjikan dia akan *control* kes ini dengan mengatakan bahawa tiada pendakwaan. Saya *confident*. Saya janjikan untuk beri kenyataan sebagai saksi sahaja.

[98] In so far as the trial court was concerned, that was a satisfactory explanation for the 'inconsistencies' in the two statements to the MACC. But in fact, there was only one inconsistency, to wit, the appointment of SP3 by SP2 in the first statement but by the appellant in the second statement. The rest were not inconsistences, but were details not in the first but in the second statement. Be that as it may, it was contended that the explanation of SP2 should have been rejected by the trial court. But was there reason for the trial court to do so? At the close of the prosecution case, it was the firm testimony of SP3, which the trial court accepted, that he was appointed by the appellant in 2006, and that on technical matters, he was instructed by the appellant with deal with SP2. Reasonably, it should have been perceived by the trial court that the first statement on the appointment of SP3 was inconsistent with the testimony of both SP2 and SP3. The explanation of SP2 was that he was coerced not to incriminate the appellant, which was consistent with the finding of the trial court that SP2 was not a willing seller. Hence, the explanation of SP2 was consistent with the evidence and findings of the trial court, which, given so, gave no reason to the trial court to reject the explanation of SP2.

[99] The fact that SP2 was a co-accused at one time was overplayed. The second statement to the MACC was given after the charge against him had been withdrawn. That was no evidence that he was induced to give the second statement. It was contended that SP2 wanted to 'embarrass' the appellant. But for what reason or purpose? The charge against him had been withdrawn. It would only appear that he had nothing to fear and nothing to gain from prosecution of the appellant. SP2 was not an interested witness. In any event, as said, those statements to the MACC were not produced in evidence. Attention should be had to the testimony. It was the testimony of SP2 in court that was important. And what was important in the testimony of SP2 was his story that pertained to the ingredients of the offence. His story on the visit to the said land with the appellant might be slightly off. But that lapse in the testimony of SP2 had no bearing on the ingredients, to wit, that the appellant as a public servant accepted a valuable thing for himself and his wife for a

consideration which he knew to be inadequate from SP2, whom he knew had connections with his official work. It was the ingredients of the offence and proof thereof that were most important. With respect, 'everything hung' not 'on the transaction in 2004' but the transaction in 2007.

[100] Pertinent to the issue of 'who ordered demolition and reconstruction', it was the finding of the trial court at the close of the prosecution case that it was the appellant. In relation to that latter finding, it was submitted (see AS paras 300–303): (i) the trial court failed to consider that Dato' Karim was not called to corroborate the alleged fact that at one meeting between Dato' Karim, SP2, appellant and wife, the appellant instructed SP3 to renovate the house, (ii) the trial court failed to consider that D19 was made after the appellant had bought the said land, (iii) SP3 could not produce any receipts to support the story of payments made by the appellant before transfer of the said land to the appellant, and, (iv) D19 was contemporaneous evidence that the appellant instructed renovation only after his purchase of the said land.

[101] But those arguments could not succeed to discredit SP3. Dato' Karim was indeed not called to testify, but SP2 and SP3 had the corroboration of each other. The trial court failed to take into account that D19 was executed after the appellant had purchased the said land. But if the trial court had considered D19 as the Court of Appeal had, it would have been apparent to the trial court, as was apparent to the Court of Appeal, that D19 was an agreement for the execution of the remainder works, which was consistent with the story of SP2 and SP3 that renovation started before the appellant bought the said land, that D19 was not a contemporaneous agreement, and that D19 and stated consideration of RM600,000 were put up at the behest of the appellant to match his financial 'eligibility'.

[102] On the issue of the credibility of SP3 which was attacked on the basis of the testimony of the appellant, it should be appreciated that the defence was not in at the close of the prosecution case. At that stage, only one question had been asked of SP3 by the defence on the alleged disagreement between SP3 and the appellant. And that sole question was not any material to discredit SP3.

[103] The trial court was more than warranted to find that the third ingredient, namely that the appellant knew that the consideration was inadequate, had been proved at the end of the prosecution case. The condition was fulfilled for the invocation of s 42(3) the ACA 1997, which read:

Section 42(3) of the ACA 1997

Where in any proceedings against any person for an offence under section 165 of the Penal Code it is proved that such person has accepted or attempted to obtain any valuable thing without consideration or for a consideration which such person knows to be inadequate, *such person shall be presumed to have done so with such*

knowledge as to the circumstances as set out in the particulars of the offence, unless the contrary is proved.(Emphasis added.)

[104] Pursuant to s 42(3) of the ACA 1997, upon proof that such person accepted or attempted to obtain any valuable thing without consideration or for a consideration which such person knows to be inadequate, 'such person shall be presumed to have done so with such knowledge as to the circumstances as set out in the particulars of the offence, unless the contrary is proved.' In the instant case, it was proved, albeit prima facie, that the appellant accepted a valuable thing for a consideration which he knew to be inadequate. That satisfied the condition precedent for the invocation of s 42(3) of the ACA 1997, which provided that it shall be so presumed. The expression 'shall be presumed' ... have the same import of compulsion. Therefore the same has to be understood as *in terrorem* ie in tone of a command that it has to be presumed that ... ' (*T Shankar Prasad v State Of Andhra Pradesh* 2004 (3) SCC 753 at p 407). It was obligatory on the trial court to invoke the presumption (*The State Of Madras v A Vaidyanatha Iyer* 1958 SCR 580 at p 590; *T Shankar Prasad v State Of Andhra Pradesh* 2004 (3) SCC 753 at p 766) which could not be ignored (*Hyderabad v G Prem Raj* (2010) 1 SCC 398 at p 406). Once the prosecution had satisfied the condition or conditions precedent, the trial court was under a legal compulsion to invoke the presumption (*Madhukar Bhaskarrao Joshi v State Of Maharashtra* (2000) 8 SCC 571 at p 148).

[105] Pursuant to s 42(3) of the ACA 1997, upon proof, that the appellant and wife accepted the said land for a consideration which the appellant knew that the consideration was inadequate, which proof was clearly there at the close of prosecution case, the appellant 'shall be presume *to have done so with such knowledge as to the circumstances as set out in the particulars of the offence*, unless the contrary is proved' (Emphasis added.). The appellant was presumed to have done so (acceptance of the said land in knowledge that the consideration was inadequate) *with such knowledge as to the circumstances as set out in the particulars of the offence.* The knowledge presumed against the appellant was '*the circumstances as set out in the particulars of the offence*', which circumstances were that, with emphasis added, in the said charge:

> Bahawa kamu pada 29 Mei 2007 di kediaman rasmi Menteri Besar Selangor, Jalan Permata 7/1, Seksyen 7, Shah Alam, di dalam Negeri Selangor Darul Ehsan, sebagai penjawat awam iaitu Menteri Besar Kerajaan Negeri Selangor Darul Ehsan, telah mendapat untuk diri kamu dan isteri kamu, Zahrah bt Kechik (650216–08–5432), suatu barang yang berharga dengan suatu balasan yang kamu ketahui tidak mencukupi iaitu lot tanah dan sebuah rumah yang terletak di alamat No. 8 & 10, Jalan Suasa 7/11, Shah Alam, Selangor Darul Ehsan, daripada Ditamas Sdn Bhd melalui Shamsudin Bin Hayroni, Pengarah Ditamas Sdn Bhd, dengan harga RM3.5 juta *sedangkan hartanah tersebut telah dibeli oleh Ditamas Sdn Bhd pada Disember 2004 dengan harga RM6.5 juta, yang mana kamu mengetahui bahawa Shamsudin Bin Hayroni mempunyai hubungan dengan kerja-kerja rasmi kamu* dan

A oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 165 Kanun Keseksaan. (Emphasis added.)

[106] Accordingly, by operation of s 42(3) of the ACA 1997, it shall be presumed (i) that the appellant knew that Ditamas bought the said land in B 2004 at RM6.5m, and (ii) that SP2 had connections with his official work. With that presumption, the fourth ingredient was proved.

[107] But as luck would have it, s 42(3) of the ACA 1997 was not invoked by C the courts below.

[108] In *Public Prosecutor v Zulkifli bin Arshad* [2011] 1 MLJ 599, it was held by the Federal Court per Hashim Yusoff FCJ, delivering the judgment of the Court, that where courts below failed to invoke presumptions, it is incumbent D upon the Federal Court to do so:

> The same applies to the failure of the Court of Appeal for not applying the presumption under s 37(da)(vi). Be that as it may, we feel that on the evidence adduced by the prosecution, and upon the failure by the learned trial judge as well as the Court of Appeal to invoke the presumption, it is incumbent upon us to do so E in accordance with the provision of s 37(da)(vi) of the (Dangerous Drugs) Act.

[109] Is it therefore incumbent on this court to invoke the presumption? In *The State Of Madras v A Vaidyanatha Iyer*, the courts below 'accepted the story F of the prosecution and after a careful analysis of the evidence found the respondent guilty of the offence charged'. On appeal, the High Court reversed the judgment and acquitted the respondent. On appeal, the Supreme Court of India held that it was obligatory on the court to raise the presumption and restored the conviction.

G

[110] Nevertheless, the appellant had defended the case without the trial court's invocation of the presumption. To invoke the presumption now would place the appellant with a heavier burden, whereas, when his defence was called, he had only an evidential burden to cast a reasonable doubt.

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[111] A presumption stands 'unless the contrary is proved'. 'The words 'unless the contrary is proved' mean that the presumption raised ... has to be rebutted by proof and not by mere explanation which may be merely plausible ... ' (*State of Assam v Krishna Rao* 1973 SCR (2) 339 at p 237; see also *T Shankar Prasad* I *v State Of Andhra Pradesh* at p 766, *SN Bose v State of Bihar* 1968 SCR (3) 563 at p 571).

[112] Proof to the contrary is on the standard of 'balance of probabilities'. That was locally settled in a long line of authorities (*Jamaludin bin Md Kassim*

v Public Prosecutor [2011] 2 MLJ 717 per Raus Sharif FCJ, as he then was, delivering the judgment of the Court; *Wong Joo Sen v Public Prosecutor* [2011] 1 MLJ 581 per Richard Malanjum CJ (Sabah and Sarawak, delivering the judgment of the court; *Public Prosecutor v Lim Hock Boon* [2009] 3 MLJ 604 per Nik Hashim FCJ; *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169 per Mohamed Azmi SCJ, later FCJ, delivering the judgment of the court; *Illian & anor v Public Prosecutor* [1988] 1 MLJ 421 per Wan Sulaiman SC, later FCJ, delivering the judgment of the court).

[113] Given that heavier burden, any invocation of the presumption now would put the appellant at a clear disadvantage. It would be different had the courts below refused to invoke the presumption, in which case, the Federal Court would step in. But the presumption had not been relied by the prosecution, and the appellant would not have prepared his defence accordingly. Any invocation of the presumption now would not seem fair. The presumption should not be invoked in the interest of fair play. But in any case, even without the presumption, there was clear evidence, namely the letters/applications of SP2's companies which bore the signatures of SP2 and the endorsement of the appellant, which clearly evinced that the appellant should know that SP2 had connections with his official work.

[114] There was a clear prima facie case. The defence was rightly called.

[115] It is safe to say that the evidence from the defence had not touched on the first and second ingredients, namely that 'the appellant as a public servant' (first ingredient) 'accepted a valuable thing for himself and his wife' (second ingredient), for there was a total absence of evidence to the contrary from the defence. But in relation to the third and fourth ingredients, the appellant disputed the story of SP2 and SP3.

[116] In relation to the transfers in 2004 and 2007, the salient testimony of the appellant could be summarised as follows. He first viewed the said land with Dato' Sumadi in 2004, but lost all interest when SP1 asked RM7m for the said land. After one of his monthly meetings with contractors where he disclosed he intended to build a house for his family in Bangi (which would have been in 2007, as Rahim & Co was instructed in 2007, which was soon after SP2 and the appellant 'agreed' to a consideration based on valuation), SP2 brought him to view the said land and offered sale thereof at RM5m. The said land in 2007 had an incomplete structure, whereas in 2004, there was a complete house. He offered RM3.5m, which SP2 turned down. Given the condition of the said land in 2007, he said to SP2 that it was difficult to put a value on the said land. He suggested a price based on valuation. SP2 agreed. Rahim & Co valued the said land at RM3.5m. His consideration was based on that valuation. He had not forced SP2 to sell. Both parties agreed to RM3.5m.

SP2 did not say that RM3.5m was inadequate. SP2 was a willing seller. He did not know that SP2 had purchased the said land at RM6.5m in 2004. There was no such meeting, where he allegedly instructed Dato' Sumadi and or SP2 to purchase the said land. At no instance had he said to SP2 that he wanted the said land. He did not know that SP2 owned Roniaga. He did not know the value of the said land in 2004. He believed that the value of said land was RM3.5m, as the house was incomplete and the bank had so valued it. He did not know that SP2 had business dealings with the Selangor State Government. He denied that SP2 had sold the said land out of his fear of adverse consequences.

[117] On the matter of renovation and reconstruction of the house, the salient testimony of the appellant could be summarised as follows. He first met SP3 in 2005 at Dato' Karim house. After his purchase of the said land, he sought out many contractors, but those contractors were not prepared to complete the construction. He met SP3 who agreed to do. D19 was the agreement between him and SP3 for the completion of construction, from the stage where he found it. The incomplete structure was about 80% of what he had in mind. Demolition and reconstruction before his purchase had nothing to do with him. He had not appointed nor instructed SP3 to deal with SP2 before his purchase. He paid SP3 in cash. He did not know that SP2 had expended monies towards demolition and reconstruction of the house. As wiring works were not satisfactory, he refused a payment of RM200,000 to SP3. Because of his refusal to make that payment, he had a serious quarrel with SP3 who removed the mobile furniture from the house. He denied that he made an advance of RM250,000 to SP3 in 2006.

[118] Highly pertinent to the aforesaid defence was the finding by the trial court that it was the appellant who appointed SP3 and instructed demolition and reconstruction from the start, even before his purchase of the said land. For if it were the appellant who appointed SP3 and who instructed demolition and reconstruction from the start, then the defence would fall off its axis. For if the appellant had instructed demolition and reconstruction from the start, then the story of purchase of an incomplete house that was difficult to put a value, could not simply stand. If the appellant had instructed demolition and reconstruction from the start, then the appellant could not say that he bought an incomplete house that was difficult to put a value.

[119] It was the firm testimony of SP2 and SP3 that it was the appellant who appointed SP3 as the renovation contractor and instructed demolition and reconstruction before 2007, that is, from the start.

[120] It was argued that SP3 could not be believed. At the close of the prosecution case, there was no material to discredit SP3 or disbelieve him. But

with the defence in, was there any material to doubt SP3? The testimony of the appellant was that he had a serious misunderstanding with SP3, and that SP3 removed furniture from the house when he refused payment of RM200,000 to SP3. That was put forth as the material to doubt SP3 or discredit his testimony that he (SP3) was appointed by the appellant in 2006. But as was observed by the trial court, there was no notice by the defence that it was the case of the defence that SP3 took away the mobile furniture. SP3 was cross-examined at length (see pp 39–64 of the appeal record). But not a single question was asked or put to SP3 on the alleged taking away of furniture. That story about the taking away of furniture was sprung for the first time when the appellant took to the stand. Only one question [b5] 'memang kamu ada perselisihan dengan OKT mengenai bayaran yang sebabkan kamu tak habiskan kerja-kerja itu?' – was put to SP3 on the alleged disagreement, to which SP3 answered 'Rumah itu siap, cuma *detailing* sikit-sikit yang belum saya siapkan. Memang ada sedikit perselisihan faham dengan OKT sebab itu tidak siapkan kerja-kerja kecil itu' (see p 48 of the appeal record). The defence then did not pursue it further, which meant that it was unchallenged evidence that it was just a small misunderstanding over unfinished details and not wiring works as alleged by the appellant. The testimony of the appellant that it was a serious misunderstanding was therefore inconsistent with the stand of the defence during the prosecution case. The testimony of the appellant on the alleged taking away of furniture was clearly an afterthought. Even with the defence in, it would not seem that SP3 could be doubted.

[121] It would certainly not seem so, in the light of what was the unchallenged testimony of SP3.

[122] At p 34 of the appeal record, SP3 testified:

> Sekitar Mac 2006, saya kenal dengan Dato' Karim. Saya mengenali Dato' Karim melalui seorang bernama Syukor iaitu pemandu Dato' Karim. Syukor membawa ke rumah saya di Gombak untuk perkenalkan Dato' Karim dengan saya. Tujuannya adalah untuk buat taman di rumah Dato' Karim di Bangi. Saya ada buat *landscape* tersebut di rumahnya di Bangi berkonsep Bali. Selepas itu, Dato' Karim ada hubungi saya lagi. Dia hubungan dia semasa dia di *Airport* melalui *handset*nya. Dia beritahu Dato' Seri Khr Toyo ingin jumpa dengan saya berkenaan dengan dia suka Bali *landscape* di rumah Dato' Karim. Saya terus setuju dan maklumkan Dato' Karim. Pada March 2006, Dato' Karim suruh saya pergi ke Shah Alam di alamat No. 8, Jalan Suasa untuk ke rumah Dato' Seri Khir Toyo.

[123] It was the further testimony of SP3 that the appellant gave an advance of RM250,000 to him, that on the technical matters, the appellant instructed him to deal with SP2, that he submitted a building plan (see p 37 of the appeal record), and that SP2 made about 4–5 payments of RM500,000 each while the appellant made other payments, which amounted to RM6m from both SP2 and appellant, to him towards the renovation (see p 38 of the appeal record). As

said, SP3 was cross-examined at length. But other than for one question, the entire cross-examination of SP3 had nothing to do with the story of SP3 that he (SP3) was appointed by the appellant from the start and that the appellant gave an advance of RM250,000 to him. Indeed, it was unchallenged evidence that SP3 received more that the RM600,000 stated in D19 and more than RM1.5m (see pp 48–49 of the appeal record), which contradicted the testimony of appellant that D19 was the entire embodiment of his agreement with SP3 on the renovation, and it was unchallenged evidence, seemingly even accepted by the defence (see p 54 of the appeal record), that SP3 received a sum RM250,000, which was consistent with the testimony of SP3 that he received an advance of RM250,000. The only question that was put to SP3 (see p 63 of the appeal record) on his appointment was 'memandangkan kamu tiada rekod di mana-mana, saya katakan perjumpaan kamu dengan OKT adalah pada bulan Mei 2007 dan bukan bulan Mac 2006' to which SP3 answered 'tidak setuju'. Otherwise, SP3 was not challenged on his story as to how he met the appellant and SP2. It was not put to SP3 that the reconstruction and renovation before 2007 had nothing to do with the appellant and or that SP2 had appointed SP3 and instructed renovation and reconstruction before the appellant came into the picture. Given that the story of SP3 was supported by SP19 and P16 and was practically unchallenged, and that the story about the taking of furniture was an afterthought, SP3 could not be doubted. A sum of RM200,000 was not paid to SP3. But that could not possibly be reason enough to lie, to falsely incriminate a former Chief Minister, all at the risk of being found out for no conceivable gain.

[124] Likewise, even with the defence in, it would not seem that the credibility of SP2 was shaken. The simple truth is that there was nothing in the defence that could put the credibility of SP2 in issue, except for the *ipse dixit* that SP2 wanted to embarrass the appellant.

[125] Rather, it would appear that the testimony of SP2 was not only intact but was substantially undisputed, which could not be so if SP2 were not a reliable witness. Cross-examination of SP2 commenced at p 115 of the appeal record and ended at p 148 of the appeal record. At p 116 of the appeal record, SP2 agreed that Roniaga and Bidara Lumayan had projects with PKNSB. At p 119 of the appeal record, SP2 agreed that the circumstances in July 2001, in relation to the Bangi Baru Project, required a waiver of the performance bond, and to that end, Roniaga extended a letter to the appellant. At p 127 of the appeal record, SP2 disagreed that he had not expended RM1.5m towards the renovation. But otherwise, in the main, the cross-examination of SP2 was an inquiry on the minutiae, on the transfer in 2004, on the authority of SP2 to enter into its purchase with SP1, on the resolutions of Ditamas to enter into agreements with SP1, on the agreements with SP1 and the consideration of

RM6.5m, on the value of the said land in 2004, on the fixtures and fittings sold by SP1, and, on the stamping of those agreements with SP1.

[126] But in relation to the crucial details that pertained to the charge, namely the transfers in 2004 and 2007, the questions asked by the defence had to do with the following. At p 121 of the appeal record, it was suggested to SP2 that he viewed the said land without knowledge as to whether the appellant had an interest, to which SP2 answered that Dato' Sumadi invited him to view the said land and later informed that the appellant was interested in the said land. SP2 denied that he viewed the interest of the appellant as opportunity to win favour. At p 122 of the appeal record, SP2 agreed that when he first viewed the said land, the appellant had not informed him that he (the appellant) was interested in the said land. To a further question, SP2 said that it was at the meeting between him, Dato' Sumadi, appellant and wife that he learned that the appellant had an interest in the said land (at p 123 of the appeal record). At p 123 of the appeal record, learned counsel asked 'Adakah dalam pertemuan tersebut OKT suruh Dato' Sumadi beli', to which SP2 answered 'Ada'. At p 143 of the appeal record, SP2 agreed that he told the appellant that RM3.5m was not enough, that for that reason he had a valuation (D23) done, and that he did not inform the appellant of that valuation (D23). And at pp 147–148 of the appeal record, SP2 disagreed that the renovation and reconstruction before 2007 had nothing to do with the appellant.

[127] This is not criticism but fact. Based on the transcript, the testimony of SP2 was not challenged with respect to (i) the meeting to discuss the purchase the said land, (ii) the consent of the appellant to SP2 to purchase the said land at RM6.5m, (iii) the meeting where the appellant and wife and Dato' Karim introduced SP3 as the contractor to SP2, after SP2 had entered into the agreement with SP1, (iv) SP2's offer of RM5m–5.5m to the appellant and the appellant's counter-offer of RM3.5m which was not agreed to by SP2, and, (v) the inquiry of SP7 to SP2 as to whether SP2 truly intended to sell at the low price of RM3.5m. All that was not challenged by the defence.

[128] The testimony of SP2 was even agreed to by the defence. At p 116 of the appeal record, learned counsel asked 'Roniaga dan Bidara Lumayan adalah *company* yang *involved* dengan PKNSB?' to which SP2 answered 'Betul'. The following question by learned counsel was 'Bagi Roniaga, masihlah berterusan?' to which SP2 answered 'Ya'. At p 117 of the appeal record, learned counsel asked 'Projek yang kamu katakan adalah dengan PKNS dan PKNSB?' to which SP2 answered 'Betul'. At p 119 of the appeal record, learned counsel asked 'Roniaga kemukakan juga surat yang intipati sama kepada OKT untuk Roniaga bagi projek Bandar Baru Bangi?' to which SP2 answered 'Betul'. Given those questions, it could only be that the defence clearly accepted that

SP2 had business with PKNS and or PKNSB where the appellant was the chairman.

[129] But the more telling bit was at pp 126–127 of the appeal record, where the questions of learned counsel and the answers of SP2 read:

S: Setiap kali bayar Nasir kamu maklumkan OKT dengan harapan akan dibayar balik?

J: Betul

S: Kalaupun tak bayar *amount* ini, harapan akan bayar semasa beli balik nanti?

J: Ya

S: Semasa beli rumah itu, kamu tahu ada risiko bahawa OKT tidak akan beli rumah itu?

Y: Ya

S: Dengan kewujudan risiko, kamu telah belanjakan wang yang besar dengan harapan akan bayar balik. Secara prinsipnya kamu tunggu sama ada akan dapat bayar balik?

J: Betul

S: Bila kamu dapat tahu secara khusus, OKT ingin beli rumah itu?

J: Semasa perbincangan untuk buat *renovation* antara OKT, isteri OKT, saya and Nasir dan Dato' Karim, cara dia suruh dan mengkehendaki Nasir buat *renovation* mengambarkan kepada saya bahawa itu rumah dia. Itu bukan fahaman dan angappan lagi. Saya berharapan besar dia akan beli balik

S: Pada 2007, harga tawaran 3.5 juta adalah tak adil, adakah ianya sedikit rendah?

J: *Very low*.

[130] With that, learned counsel then turned to probe on the alleged renovation costs paid by SP2. But when learned counsel left it at that, the effect of those aforesaid questions and answers was that it was not disputed, if not also accepted, that (i) SP2 had purchased the said land at the behest of the appellant, (ii) renovation was instructed by the appellant from the start, (iii) SP2 informed the appellant of his (SP2) payments to SP3, in the hope that he would be repaid, (iv) SP2 knew there was a risk that the appellant might not buy the said land from him, (v) SP2 later knew that the appellant had every intention to buy the said land from him (SP2) when the appellant adopted the manner of an owner and instructed SP3 to renovate the house, and (vi) the appellant's offer of RM3.5m was very low, which incidentally was exactly the story of SP2 from the start.

[131] The above clearly showed out that the defence was inconsistent with the stand taken during the prosecution case. The appellant said he was not aware that SP2 had dealings with his official work, but it was hitherto put to SP2 that Roniaga and Bidara Lumayan had projects with PKNSB, that Roniaga, in relation to the Bandar Baru Bangi project, extended a letter to the appellant for the waiver of a performance bond, and that Roniaga had ongoing business with PKNS/PKNSB. The appellant denied that he instructed SP2 to execute the renovation, that he instructed SP3 to deal with SP2 and that he had knowledge that SP2 had executed renovations, but SP2 was hitherto asked to confirm 'Setiap kali bayar Nasir kamu maklumkan OKT dengan harapan akan dibayar balik? The appellant said that he believed that the said land was only worth RM3.5m, whereas SP2 was hitherto asked to confirm that the offer of RM3.5m was low. The appellant denied that SP2 had purchased the said land with his consent, or that he had instructed renovation, but hitherto SP2 was asked at p 126 of the appeal record to confirm that he (SP2) renovated the house in the expectation that the appellant would buy it from him. The appellant denied that after SP2 had purchased the said land, there was a meeting where renovation was discussed, but it was unchallenged evidence that there was a meeting with appellant and wife, Dato' Karim, SP3 and SP2 in attendance, where renovation was discussed and the appellant instructed SP3 to undertake the renovation, which raised the hope in SP2 that the appellant would buy the said land from him.

[132] The testimony of the appellant was also contradictory. On one hand, he said that SP2 never said that RM3.5m was inadequate, but on the other hand, he said that SP2 wanted RM5m–5.5m and that SP2 did not agree with his offer of RM3.5m. He said that he did not know that SP2 had dealings with the Selangor State Government, but at the same time he said that he knew SP2 since 1997, when the Prime Minister praised Majulia which belonged to SP2 since 2002 (p 312 of the appeal record).

[133] Further, the appellant was not supported by SD2 who testified that SP2 had official business at the Office of the State Secretary, which contradicted the denial of the appellant that he had no knowledge that SP2 had any connection with his official function.

[134] The above must weigh against the defence. But even if not, it would still not seem that the defence of 'willing seller' was credible. In the first place, as was rightly asked by the trial court, why should SP2 sell the said land at RM3.5m in 2007 when he had bought it at RM6.5M in 2004? Why should SP2 sell at such a substantial loss if there were no compelling forces? There was no evidence that SP2 was in financial straits. It would not add up that SP2 was a willing seller. If SP2 had been a willing seller, then SP2 would not have said to SP7 who corroborated him, that he was forced to sell, which conversation was

recorded by the Valuation Department in P40 (see p 963 of the appeal record) and which independently verified that the story of SP2 had not changed an iota from 2007. Given that the story of SP2 was the same throughout, even from before the appellant/SP2 were questioned/charged by the MACC, then it would only surely follow that the story of SP2 – not a willing seller – could not have been fabricated to avoid prosecution and or to implicate the appellant.

[135] The explanation of the appellant for that consideration of RM3.5m was that the structure he viewed in 2007 was different from the house he viewed in 2004, that the structure in 2007 was 50%–60% complete and therefore difficult to put a value, and for that reason he wanted a consideration based on valuation. The effect of that testimony of the appellant was that the said land with an incomplete house had not the value as before. He produced the reports of two valuers (SD4 and SD5) to dispute the valuation of the prosecution.

[136] It might well be that land with an incomplete structure would be difficult to put a value thereon. But whether it was difficult or not to put a value thereon, it would still not be usual practice, where parties could not agree on consideration, to fix the consideration by valuation. 'Willing seller does not mean a person willing to sell without reserve for any price that he can obtain, but one who is willing to sell, making the most in the circumstances of his property ... ' (*Halsbury's Laws of England* (5th Ed) Vol 18 para 798). Even if the structure were incomplete, a seller would nonetheless have an idea of the bottom price, and if the buyer could not meet it, the seller would look elsewhere for another buyer. 'It must not be assumed that the seller will act without due regard to his own interests' (*Robertson's Trustees v Glasgow Corpn* 1967 SC 124). It could be asked, and it could be answered that under normal conditions and circumstances, no seller in control of the situation, unless under forced sale conditions, would subject the fate of his bottom price to valuation. Sale based on valuation was unusual and abnormal. Despite the explanation of the appellant, it could not seem that SP2 could have been a willing seller, which supported the story of SP2 that he had no option but to sell to the appellant. A willing seller would reasonably not be unwilling to sell if the consideration were adequate. If SP2 were not a willing seller, then it would appear that the consideration would not have been adequate, which supported the story of SP2 that he had no option but to sell.

[137] Clearly, at the close of the entire case, there was no room for doubt. It was the appellant who instructed demolition and reconstruction from the start. And SP2 was not a willing seller.

[138] The remaining argument of the appellant, to wit, that the trial court had given too much weight to the valuation reports of the prosecution, put into question the value of the said land.

[139] The value of land 'in general can be measured by a consideration of the prices that have been obtained in the past of similar quality and similar positions ... ' (*Raja Vyricherla Narayana Gajapatiraju v The Revenue Divisional Officer, Vizagapatam* [1939] AC 302 per Lord Romer, delivering the judgment of the Board). In valuing lands, the comparison method is widely accepted in acquisition proceedings. In *Nanyang Manufacturing Co v The Collector of Land Revenue, Johore* [1954] 1 MLJ 69, it was held by Buhagiar J. 'that there are three recognised methods of valuation, viz: (1) opinion of experts; (2) the price paid, within a reasonable time, in bona fide transactions of purchases of lands acquired, or of the lands adjacent to the land acquired and possessing similar advantages; and (3) a number of years' purchase of the actual or immediately prospective, profit from the lands acquired.

[140] In *Iun Chung Yang & anor v Superintendent of Lands and Surveys, First Division, Sarawak* [1980] 2 MLJ 15, it was held by the Federal Court per Chang Min Tat FCJ, delivering the judgment of the court, that the comparison method is not only a fair method but is the first method to be used:

> We agree that the comparison method, that is the method of taking recent bona fide sales of land in the vicinity possessing similar or near similar characteristics, recommended in *Nanyang Manufacturing Co v CLR Johore* [1954] MLJ 69 and since then consistently adopted by our courts at all levels, is a fair method but in applying it, it has to be borne in mind that the operative condition is 'lands acquired and possessing similar advantages.' It does not work when transactions of purchase of bare lands are used as the yardstick for lands with houses. Nevertheless, we do not think that difficulties of assessment absolves the court from its task of doing its duty and from adopting another method open to it to do so.
>
> Where therefore there are no comparable transactions available that could validly be applied, the two usual methods are either the land and capitalisation method in which to the value of the land as land is added a capitalisation of the return actually received or reasonably expected to be received therefrom, as applied in State of *Kerala v PP Hassan Koya* [1968] SCA 362; AIR 1968 SC 1201 and in *Vyricherla Narayana v The Revenue Divisional Officer*, Vizagapatnam 66 IA 104 or the land and building method as applied in *T Adinarayana Setty v Special LA Officer* AIR 1954 Mysore 71.

[141] Comparables offer the best indication of market price (*Pentadbir Tanah Daerah Petaling v Glenmarie Estate Ltd* [1992] 1 MLJ 331 per Mohamed Yusoff SCJ, delivering the judgment of the court). 'Prices paid for comparable property in the neighbourhood are the usual as well as the best evidence as to market value' (*Wong Poh Oi v Gertrude Guok & anor* [1966] 2 MLJ 134 per Buttrose J).

[142] Syed Agil Barakbah FCJ, delivering the judgment of the Court in *Ng Tiou Hong v Collector of Land Revenue, Gombak* [1984] 2 MLJ 35, thus enunciated on 'market value':

> First, market value means the compensation that must be determined by reference to the price which a willing vendor might reasonably expect to obtain from a willing purchaser. The elements of unwillingness or sentimental value on the part of the vendor to part with the land and the urgent necessity of the purchaser to buy have to be disregarded and cannot be made a basis for increasing the market value. It must be treated on the willingness of both the vendor to sell and the purchaser to buy at the market price without any element of compulsion. Secondly, the market price can be measured by a consideration of the prices of sales of similar lands in the neighbourhood or locality and of similar quality and positions. Thirdly, its potentialities must be taken into account. The nature of the land and the use to which it is being put at the time of acquisition have to be taken into account together with the likelihood to which it is reasonably capable of being put to use in the future for eg the possibility of it being used for building or other developments. Fourthly, in considering the nature of the land regard must be given as to whether its locality is within or near a developed area, its distance to or from a town, availability of access road to and within it or presence of a road reserve indicating a likelihood of access to be constructed in the near future, expenses that would likely be incurred in levelling the surface and the like. Fifthly, estimates of value by experts are undoubtedly some evidence but too much weight should not be given unless it is supported by, or coincides with, other evidence. (*Superintendent of Lands and Surveys, Sarawak v Aik Hoe & Co Ltd*, *Vyricherla Narayana Gajapatiraju v The Revenue Divisional Officer*, *Vizagapatam, and Nanyang Manufacturing Co v Collector of Land Revenue, Johor*).
>
> The safest guide is evidence of sales of similar land of similar quality or position in the locality at or prior to the time of the acquisition. The prices paid for such sales can be used as comparables subject to making allowances for all the circumstance.
>
> In determining market value, our courts as a matter of course have adopted the comparable method of valuation of land where there is ample evidence of sales or awards involving similar lands. What this method entails was succinctly explained by the Federal Court in *Ng Tiou Hong v Collector Of Land Revenue, Gombak* [1984] 2 MLJ 35 ... ' (*Malakoff Bhd v Pemungut Hasil Tanah Seberang Perai Utara, Butterworth* [2005] 2 MLJ 229 per Arifin Zakaria JCA, as he then was).

[143] Such is the acceptance of the comparison method that it was held by the Federal Court per Alauddin FCJ, as he then was, delivering the judgment of the court in *Pentadbir Tanah Daerah Kota Tinggi v Siti Zakiyah bte Sh Abu Bakar & Ors* [2006] 2 MLJ 426, that failure by the trial court to use the comparison method amounted to a fatal misdirection:

> Given the fact that these comparables are in every aspect similar to the scheduled land, we find that the learned trial judge's failure to adopt the 'comparison method' amounts to a misdirection which in turn has fatally affected his decision with respect to the value of the scheduled land (see *Ng Tiou Hong v Collector of Land Revenue, Gombak*; *Nanyang Manufacturing Co v The Collector of Land Revenue, Johore* [1954] 20 MLJ 69 and *Lee Chee Cheng & Ors v Pentadbir Tanah Daerah Seberang Perai Tengah, Bukit Mertajam* [1999] 4 MLJ 213).

[144] In *Collector of Stamp Duties v Ng Fah In & Ors* [1981] 1 MLJ 288, Razak J specified the features of a comparable sale:

> It is common ground that in determining the market value, nowhere defined in the Ordinance, the courts should be guided by the principles that apply under the Land Acquisition Act – namely, market value is the price which a willing seller not obliged to sell, might reasonably expect from a willing purchaser with whom he was bargaining for sale and purchase of the land (*Nanyang Manufacturing Co v CLR Johore* [1954] MLJ 69) and this amount can best be determined by looking at recent sales of comparable lands in the vicinity. The learned judge was aware of this principle. He was also aware of what the attitude of the court should be when considering comparable sales, for he quoted this passage from *LAO v Venkateswami* (1967) 1 An WR 79 cited by Aggarawala, Vol 1, 4th Ed, p 339:
>
> > The underlying principle of fixing the market value with reference to comparable sales is to reduce to the minimum the element of speculation. In a comparable sale the features are:
> >
> > (1) It must be within a reasonable time of the date of notification. (in our case, the date of the transfer);
> >
> > (2) it should be a bona fide transaction;
> >
> > (3) it should be a sale of the land acquired or of the land adjacent to the land acquired; and
> >
> > (4) it should possess similar advantages.
>
> It is only when all these factors are present that it could merit consideration as a comparable sale.

[145] The comparison method is also used in valuing lands for purposes of assessment of rates. In *Majlis Perbandaran Subang Jaya v The Alice Smith Schools Association* [2011] 2 MLJ 442, where the comparison method in determining the open market value was rejected by the High Court, it was held by the Federal Court per James Foong FCJ and Raus Sharif FCJ, as he then was, Heliliah FCJ agreeing, that the comparison method was wrongly rejected in favour of the 'contractor's test'. In reversing the decision of the High Court, the Federal Court also stressed that the comparison method is the identification of recent bona fide sales transacted at arm's length to determine the market value:

> It is not in dispute that in determining the open market value, the JPPH valuation officer had adopted the comparison method. The comparison method (as described by JPPH) is basically identifying comparables of sales of nearby properties which were transacted at arm's length to determine the market value of the holding and based on this market value assign an appropriate percentage to it as the return derived from this type of property.

[146] Hence, a fair estimate of market price involves proper inquiry into comparable prices, and what prices are comparable as relevant invite a common

sense approach to the question (*Alagappa Chettiar v Collector of Land Revenue, Kuala Lumpur* [1968] 1 MLJ 243 per Ong Hock Thye FJ, as he then was; Raja Azlan Shah J, as HRH then was, and Pawan Ahmad J concurring). 'What is fair and reasonable market value is always a question of fact depending on the nature of the evidence, circumstances and probabilities in each case. The guiding star would be the conduct of a hypothetical willing vendor who would offer the lands and a willing purchaser in normal human conduct would be willing to buy as a prudent man in normal market condition ... '(*Periyar and Pareekanni Rubber Ltd v State of Kerala* (1991) 4 SCC 195)

[147] Suitably, all valuers in the instant case used the comparison method. However, the valuation of SP9, of RM4,807,948, related to the value of land and original house. SP9 did not value land and incomplete building in 2007. The valuation of SD4 related to the value of land and original building in 2005. Hence, SD4's valuation also could not assist the court. If at all, the testimony of SD4 (see p 340 of the appeal record), that the consideration of RM6.5m in 2004 was not too high, attested that the consideration of RM3.5m in 2007 would not have been adequate. SD4's valuation lent no assistance to the defence.

[148] But the valuations of SP8, SP10 and SD5 pertained to the value of land and 60% building in 2007. Those valuations were RM5.55m in the case of SP8, RM5.52m in the case of SP10, and RM3.5m in the case of SD5.

[149] There were three valuations from three different valuers (SP8, SP10, and SD5) who used the same methodology but yet came out with different results on the value of land and incomplete building. But those three valuations were not exactly as different as chalk and cheese. There was common ground. Both SP8 and SP10 valued land and incomplete building at about RM5.5m. Only SD5 was alone in his valuation of RM3.5m for land and incomplete building. But SD5 was not alone in his valuation of land minus incomplete building. Three valuers (SP8, SP9 and SD5) had more or less agreed on the value of land alone, minus the incomplete building. SP8, SP9 and SD5 all agreed that the value of land alone was in the region of RM2.5m. But where SP8 and SD5 disagreed, was with respect to the value of the incomplete building (SP9 had not valued the incomplete building, while SP10 had not given a breakdown of his valuation). While SP8 valued land and incomplete building at RM3.2m, SD5 had it at RM1,328,030. The difference in the valuation of the incomplete building was the root for the difference in the valuation of SP8 and SD5. Whose valuation was therefore more reliable? The answer was hidden in the established evidence.

[150] To recapitulate, it was the unchallenged testimony of SP10 that the value of land and complete building was RM7.5m.

[151] SD5 valued the land at RM2,247,810 and the incomplete building at RM1,328,030. Based on the valuation of SD5, it would cost a further RM885,353.33 to complete the balance 40% building, which would mean that the value of land (RM2,247,810) and complete building (RM2,213,383.33) would be RM4,462,293.33, which was way off the unchallenged value of land and complete building, of RM7.5m.

[152] SP8 valued the land at RM2,350,000 and the incomplete building at RM3,200,000. Based on the valuation of SP8, it would cost a further RM2,133,333.33 to complete the balance 40% building, which would mean that the value of land (RM2,350,000) and complete house (RM5,333,333.33) would be RM7,683,333.33, which was very close to the unchallenged value of land and complete house, of RM7.5m.

[153] On the evidence, it would not seem that the valuation of SD5 could be preferred. But even if the valuation of SD5 should be preferred, it would not make any difference. SD5's valuation could not cast any doubt that the consideration was inadequate. It was established evidence that SP1 expended about RM3.8m–RM4.2m to buy the said land and erect the house in 1998/1999, and that the transaction in 2004 was on a willing seller and willing buyer basis. For that transaction in 2004, the Valuation Department had valued land and house at RM5m. ' ... the best evidence of the value of property is the sale of the acquired property to which the claimant himself is a party in its absence the sale of the neighbouring lands ... ' (*Periyar and Pareekanni Rubbers Ltd v State of Kerala*). By all accounts, the value of land and house in 2007 should at least be RM5m, which was supported by the valuation of SP9 who gave the value of land in 2007 and original house at RM4,807,948. Would the value of that property then fall like a stone, from at least RM5m in 2004 to RM3.5m in 2007? Reasonably, it would not. But if it had fallen to RM3.5m, it was only because of the renovation and reconstruction that the appellant had instructed right from the start. Had the house been untouched, it should at least hold its value. But the appellant took over the house and broke it. Any diminution in the value of land and house was caused by the appellant. The appellant accepted land and house of value of at least RM5m. The appellant took an egg and broke it, so to speak. The appellant must recompense an egg and not the value of a broken egg. All loss was brought about by the appellant. He could not get away by saying that it was an incomplete house. He took full value of the land and house. He must pay full value for the land and house, which was at least RM5m. RM3.5m was clearly inadequate consideration.

[154] All review of the entire case failed to reveal any doubt to warrant reversal. Notwithstanding the defence and arguments of learned counsel, it

remained that the offence as charged was proved beyond all reasonable doubt at the end of the entire case. We therefore unanimously dismiss this appeal against conviction.

Zulkefli CJ (Malaya):

SENTENCE

[155] In relation to the sentence, learned counsel for the appellant, Mohd Shafee bin Abdullah, mitigated that the appellant was a first offender, that the crime was not violent, and, that a custodial sentence should be of the last resort. On the forfeiture of the subject matter, learned counsel for the appellant contended that the subject matter of the offence was not the said land but the differential sum between the fair value of the said land and the consideration paid by the appellant, and that the said land, since it was not the subject matter of the offence, could not be forfeited. Learned counsel for the appellant further proposed that if the said differential sum is to be forfeited, it should be halved, in view of the fact that only a half undivided share in the said land was registered in the name of the appellant. The appellant, who sought and obtained leave to address the court, amongst others offered to perform community service, namely, free dental service to the poor, for a number of days in a week for a period of one to two years, in lieu of imprisonment. The appellant also took the opportunity to highlight his service, as the Chief Minister, to the State of Selangor. The learned DPP in reply laid stress on the public interest.

Curia Advisari Vaunt

DECISION

[156] It is trite that in deciding the appropriate sentence the first and foremost consideration is the public interest (See the case of *R v Kenneth John Ball* 35 Cr App R 164). It is an established principle that the sentence of the court of first instance should not be altered unless it is manifestly wrong, wrong in the sense of being illegal or being unsuitable to the proved facts and circumstances (*Public Prosecutor v Fam Kim Hock* [1957] 1 MLJ 20; see also *Liow Chow and another v Public Prosecutor* [1939] 1 MLJ 170), or manifestly excessive or inadequate (*Public Prosecutor v Loo Choon Fatt* [1976] 2 MLJ 256). As a sentence is a matter of discretion, the appellate court should be slow in interfering with the sentence imposed by the court below. Mitigating factors should not be disregarded. A court has the discretion to be lenient and merciful provided there are extenuating circumstances and it is in the public interest to do so (see the case of *Public Prosecutor v Khairuddin* [1982] 1 MLJ 331). But in the final analysis, a sentence must reflect the seriousness or triviality of the offence. What punishment then would reflect that in the instant case?

[157] As a public servant and chief executive of the State, the appellant took a valuable thing for a consideration which he knew was inadequate from a person whom he knew was concerned with him as a public servant in his official functions. The appellant took advantage of his officlal position. One purpose of s 165 of the Penal Code is to prevent that sort of corruption. Corruption in all manner and form cannot be condoned. A fine would not send that message. Neither would community service. In any event, community service is an option only in the case of youthful offenders (s 293 of the CPC) and the provisions of the Offenders Compulsory Attendance Act 1954 (Act 461) with regard to community service do not apply to the appellant (see s 5(1) of Act 461). The instant offence, which is destructive of public confidence in the government, was not trivial in nature. Imprisonment was the right and proper punishment. A year's imprisonment, which was not appealed against by the learned DPP, was hardly excessive. We unanimously dismiss the appeal against the sentence. We therefore affirm the sentence of one year imprisonment meted out by the trial judge.

[158] Upon conviction of the appellant, the trial court ordered forfeiture of the said land. At the stage of submissions before us, it was contended that forfeiture was unconstitutional and that there should be an enquiry on the ownership of the said land before forfeiture. Our short riposte to the constitutional point is that forfeiture was ordered in accordance with the law which mandated forfeiture upon conviction of the appellant (see s 36(1) read with ss 56 and 2 of the Anti-Corruption Act 1997). The said land was not arbitrarily forfeited. It was a lawful deprivation. There was no breach of art 13(1) of the Federal Constitution. The appellant and wife are the registered proprietors. Therefore, the appellant and wife are the owners. Any enquiry on the ownership of the said land would only be an idle exercise.

[159] We also could not agree with the latest argument of learned counsel for the appellant that the subject matter of the offence was the differrential sum. The subject matter of the offence was the said land and that the appellant accepted. On forfeiture of the said land and whether there was a breach of art 13(1) of the Federal Constitution, we agree with the observation made by the Federal Court in the case of *Arumugam Pillai v Government of Malaysia* [1975] 2 MLJ 29 that whenever a competent Legislature enacts a law in the exercise of any of its legislative powers, destroying or otherwise depriving a man of his property, the latter is precluded from questioning reasonableness of the law by invoking art 13(1) of the Federal Constitution, however arbitrary the law might palpably be. With the conviction, the appellant could not resist forfeiture of the subject matter of the offence.

[160] In the present case there was a chargee bank with rights of a chargee, not owner. There was an encumbrance on the said land. We therefore unanimously uphold the order of forfeiture of the said land but subject to the charge, if any.

Appeal dismissed and conviction, sentence and the order for forfeiture of land affirmed.

Reported by Ashok Kumar